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In the Supreme Court of the United States

OCTOBER TERM, 1998

LAFAYETTE PLACE ASSOCIATES,

PETITIONER,

v.

CITY OF BOSTON,

RESPONDENT.

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

Stephen H. Oleskey
Counsel of Record
Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6544

Alan M. Dershowitz
Of Counsel
1575 Massachusetts Avenue
Cambridge, MA 02138-2801
(617) 495-4617

40pp

QUESTION PRESENTED

When a State court sharply alters settled common law, abrogating all private rights in a contract for the sale of land by a municipality, and transferring these rights to the municipality, do the Takings or Due Process Clauses limit the State court's ability to apply its new rule retroactively?

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PETITION FOR A WRIT OF CERTIORARI

Lafayette Place Associates ("LPA") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.[1]

OPINIONS BELOW

The denial of LPA's petition for rehearing to the Supreme Judicial Court of Massachusetts (App. A) is unreported. The opinion of the Supreme Judicial Court of Massachusetts (App. B) is reported at 427 Mass. 509 (1998). The memorandum of decision of the Superior Court of Massachusetts (App. C) is unreported.

JURISDICTION

The Supreme Judicial Court of Massachusetts entered its judgment on May 20, 1998 (App. B), and denied LPA's petition for rehearing on July 1, 1998. (App. A). On September 15, 1998, Justice Souter granted LPA's motion for an extension of time to file this petition to November 28, 1998. LPA invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. The petition for writ of certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).[2]

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[1] Pursuant to Supreme Court Rule 29.6, LPA states that it is not a corporation, but a Massachusetts limited partnership, the ultimate interest of which is owned by Mondev International, Ltd., a closely held Canadian corporation.

[2] LPA timely raised a federal question in its petition for rehearing to the Supreme Judicial Court of Massachusetts (App. A), its first opportunity to raise such issues.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, Section 1, which states in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case raises an important question in the evolving body of law protecting private property from State action: how far may a State court go in altering settled common law rules to defeat a private vested property rights in a contract with that State or its subdivision? At stake is the reasonable expectation of private citizens that they may rely on settled principles of common law in entering contracts with the State.

This case arises out of a 1978 contract between Lafayette Place Associates (LPA), and the City of Boston (City), and the Boston Redevelopment Authority (BRA), for LPA to redevelop a dilapidated area of downtown Boston. The contract also granted LPA an option in an adjoining City property, the Hayward Parcel, which LPA could exercise upon the completion of the first phase of the project which included a large mall. The department store to be built on that Parcel was vital to the financial success of the entire project.

By 1986, when LPA exercised its option for the Hayward Parcel, the City was unwilling to comply with the contract because the market value of the Parcel had appreciated dramatically. The City therefore stonewalled LPA's attempts to acquire the Parcel, while the BRA imposed regulatory road blocks.

Thwarted in its efforts to acquire the Parcel, LPA leased its interests in the mall and delegated the option to the Campeau Corporation (Campeau). Nonetheless, the City continued to block the acquisition until the acquisition period expired.

LPA ultimately filed suit in State court against the City and the BRA to recover its interest in the Parcel. After a 10-day trial, the jury returned verdicts of $9.6 million against the City in contract, and $6.4 million against the BRA in tort. On post trial motions, the judge granted the BRA judgment n.o.v. on the ground that it was immune from liability for intentional torts under State law but let stand the judgment against the City.

Both LPA and the City appealed the judge's rulings, and the Massachusetts Supreme Judicial Court (SJC) granted direct appellate review. The SJC unanimously affirmed the judgment n.o.v. for the BRA and, in a series of unprecedented and unanticipated holdings, reversed LPA's $9.6 million judgment against the City. The SJC's decision ran contrary to longstanding common law precedent in articulating new rules governing obligations of a party seeking to enforce a contract and in further holding that these new rules would be applied with special force to parties seeking to recover in contract against government.

LPA timely filed a petition for rehearing, arguing that the SJC had made profound errors in its interpretation of State law, that the decision effectively operated as a "taking," and that the decision was so arbitrary that it denied LPA due process rights. The SJC summarily denied LPA's petition.

LPA asks this Court to consider whether the SJC's application of unanticipated and unprecedented common law rules to LPA to effect a direct transfer of property from LPA to the City, constitutes a "taking" of LPA's property or violates LPA's due process rights.

A. The Tripartite Agreement

In 1978, LPA, a private partnership, entered into a contract (The Tripartite Agreement) with the City and the BRA to redevelop a distressed area of downtown Boston. The Tripartite Agreement provided for a two-stage development. LPA agreed to build a mall, parking garage and hotel as Phase I, and, upon its completion, have an option to purchase the Hayward Parcel, an adjoining lot, on which to construct Phase II, including an anchor department store.[3]

The Tripartite Agreement provided that the price for the Parcel was to be set by a formula amounting to one-half the value of the parcel in 1978 plus one-half the value to the parcel of any increase in value attributable to public improvements and the

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[3] Officials from LPA and Campeau testified that Phase II was crucial to the success of the project. Campeau's project coordinator testified, "If you didn't have [the Hayward Parcel], you didn't have a development. I can't say it any stronger."

construction of Phase I. Due to the rapid appreciation of property values in downtown Boston by 1986, when LPA exercised its option, the option price was only a small fraction of the Parcel's market value. The new City Administration was determined to avoid its contractual obligation to sell the property at a price it believed had become far too favorable to LPA.

B. City's Actions to Avoid the Contract

After LPA exercised its option, the City was obligated to obtain "forthwith" the appraisals needed to calculate the formula price and to set the final dimensions of the property.[4] LPA repeatedly, but unsuccessfully, pressed the City to fulfill these obligations.[5]

In the meantime, City agencies acted to thwart LPA's acquisition. The City Traffic Commissioner announced plans for a new road through the middle of the Parcel. The BRA also told LPA it would impose height restrictions on the Parcel of 125 to 155 feet, rather than the 300 to 330 feet agreed to only months earlier.

In mid-1987, the City and BRA pressured LPA to agree to a "drop dead" date of January 1, 1989, for the acquisition. LPA acceded to these demands in a

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[4] Construction of Phase I, and related public improvements, had slightly altered the dimensions of the Parcel.

[5] The contract did set forth a means by which disagreement over the appraised value of the property could be settled. However, the City never raised a dispute over the property's value; it simply refused to move forward by getting appraisals or setting the final boundaries.

show of good faith. A BRA official gloatingly described the new termination date as "totally in the City's favor and . . . permit[ing] the City to dispose of the Parcel to another . . . if LPA were unable to perform satisfactorily within the option period."

C. City Blocks LPA's Efforts to Sell Its Interests In Hayward Parcel to Campeau

By late 1987, LPA realized it could not successfully obtain the Hayward Parcel in the face of such staunch opposition from the City and agreed to sell its interests to Campeau, a large and highly successful developer. The City, however, sought to block the transfer to preclude LPA or Campeau from acquiring the Parcel at the option price. The BRA director told LPA that he would not approve the transfer "until I get a higher value for the [Parcel]. And I don't want you to take all that profit and run back to Canada with it." The Chairman of the City's Real Property Board similarly wrote to the Mayor,

> If, without negotiation, the BRA and the City allow the sale or transfer to occur, the new owner, Campeau (and also the prior owner) would realize an immediate monetary windfall due to the Option Agreement . . .

In January, 1988, the Real Property Board's official minutes bluntly noted,

> The Board expressed its desire . . . to receive the fair market value of the Hayward Parcel (abandoning the Tripartite formula) . . .

Once it became clear to LPA that it could neither purchase the property itself nor have the transfer to Campeau approved, LPA abandoned the sale and,

under far less favorable terms, leased the mall property to Campeau, while simultaneously delegating to Campeau its right to acquire the Parcel.

D. Campeau's Efforts to Purchase the Hayward Parcel

Although Campeau, which proposed a much larger project, repeatedly asked the City for an extension of the January 1, 1989 "drop dead" date, the City ignored Campeau's requests. By December 1988, when the City had neither extended the acquisition date nor approved the new project, Campeau wrote the Mayor offering to purchase the Parcel "immediately."

The City waited to respond until December 30, when the BRA Director wrote that, because the option would expire the next day, Campeau could thereafter purchase the Parcel for its "fair reuse value," noting that the expiration of the option "simply puts the question of the disposition of the Hayward Parcel in a current context."

LPA reacquired the mall and the rights to the Parcel when Campeau later filed for bankruptcy. Without the anchor department store on the Hayward Parcel, however, the mall failed and was foreclosed.

E. Prior Proceedings

In March, 1992, LPA filed suit against the City and the BRA. At trial in 1994, LPA alleged that the City and the BRA had breached their contractual obligations to LPA, and also that the BRA had wrongfully interfered with the LPA-Campeau sale agreement.

On October 21, 1994, the jury returned special verdicts,[6] including a verdict for breach of contract against both the City and the BRA, and a verdict for LPA on its interference claim against the BRA, awarding LPA $9.6 million against the City and $6.4 million against the BRA. The trial judge ruled that the contract verdict against the BRA could not stand because the jury had concluded in a special question that the BRA was not acting as the agent for the City.

In August, 1995, the judge granted the BRA's motion for judgment n.o.v. on the ground it was immune from liability for intentional tort under State law but denied the City's motion which argued, *inter alia*, that no valid contract existed for the Hayward Parcel, and that the City had not breached the contract. Both the City and LPA appealed, and the SJC granted direct appellate review.[7]

In direct repudiation of the jury's special verdict that LPA had fulfilled its contractual obligations, the SJC held that LPA could not recover against the City for breach of contract because it had failed, as a matter of law, to demonstrate that it was ready, willing, and able to perform its contractual obligations. The SJC further held, as a matter of law,

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[6] The jury returned eight special verdicts, concluding: that there was a valid contract; that LPA fulfilled its obligations under the contract; that both the City and BRA breached the contract; that the BRA did not act as the City's agent; and that the BRA intentionally interfered with LPA's contract with Campeau. The jury never reached the question whether LPA was excused from performance because of the City's actions, as it was instructed not to address that issue if it concluded, as it did, that LPA had fulfilled its own contractual obligations.

[7] The SJC upheld the judge's ruling that the BRA was immune under State law. LPA does not seek review of that decision.

that LPA had not offered sufficient evidence at trial that it was excused from performance by virtue of the City's manifest intent not to perform.

REASONS FOR GRANTING CERTIORARI

This petition asks this Court to determine for the first time what protections private citizens have from the retroactive application of State common law. This Court has placed limitations on the retroactive application of legislation, as well as limitations on the retroactive application of judge-made law in the criminal context. *See, e.g., Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998) (legislation with severe retroactive effects may violate due process and takings clauses); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) (negating retroactive repeal of State contractual obligations); *Bouie v. City of Columbia*, 378 U.S. 347 (1963) (striking down the retroactive application of judge-made law).

This Court has not yet applied these same principles to retroactive changes in civil common law, and has at times suggested that citizens have no federally protected rights in State common law. *See Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 88 n.32 (1978); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930). The reasons for treating the common law specially are well established.[8] The

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[8] Retroactive application of judge-made law in the criminal context may also be thought different than in the civil context because of the special protections afforded the citizen faced with criminal sanctions. *See Bouie*, 378 U.S. at 353-55. However, *Bouie* does make clear that the unfairness inherent in retroactive legislation is also present when courts announce new rules. *Cf. Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring) ("We should not indulge in the fiction that the law now announced has always been the law. . . .").

essence of the common law is its evolution over changing circumstances and times. This Court has been reluctant to place constitutional limitations on this important attribute of the common law tradition.

This case raises the question whether State courts are always free to alter settled relationships through the common law. When the State court has made a "sharp break" with common law precedent, and thereby takes property from a private citizen and gives it to the government, there is an important need to protect the private citizen from the State for at least two reasons.

First, where a common law decision makes a sharp break with precedent and its effects are effectively more "legislative," the constitutional protections against retroactive legislation should apply. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (whether "sharp break" with prior law is key component of decision whether to apply decisions retroactively). Indeed, the general rule that legislation does not apply retroactively arose from a concern that large scale shifts in law may defeat settled expectations. *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). Where that retroactive effect is too severe, the legislation may be deemed unconstitutional. *See Eastern Enterprises*, 118 S.Ct. at 2153. Analogously, where the retroactive effect of a change in common law is severe, similar constitutional protections should be afforded.

Second, where the State court's decision operates to take a private citizen's property and give it to the

government, constitutional scrutiny is warranted. Courts will more readily find "takings" where the property is taken for the government's own use "than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *see Armstrong v. United States*, 364 U.S. 40, 48-49 (1960) ("total destruction by the Government of all value of these liens ['of which loss the Government was the direct, positive beneficiary'] has every possible element of a . . . 'taking'."). Similarly, under due process analysis, where the State is overseeing its own self-interest, heightened scrutiny of the State's actions are required. *See United States Trust*, 431 U.S. at 26 & n.25 (heightened scrutiny needed under the Contracts Clause where "State's self-interest is at stake"). In this case, both elements combine to warrant this Court's review.[9]

A. Does The Retroactive Application Of A Sharp Change In Common Law Operate As A Taking In This Case?

1. *The SJC's Opinion Constituted a Sharp Break with Prior Doctrine*

The SJC's opinion broke with prior precedent in three ways: (1) the SJC created additional obligations for parties seeking to recover in contract; (2) the SJC

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[9] The review requested by LPA has two inherent limiting principles. The first is that a sharp break with prior law would be required, and second, the government would have to be the direct beneficiary. State courts would likely be effective in self-policing where these principles are involved. Consequently, granting review here would neither lead this Court toward a generalized review of state court decisions nor flood the Court with petitions seeking this type of review.

concluded, as a matter of law, that LPA was not excused from performance even though prior law had established this as a question for the jury; and (3) the SJC applied its new rules with special force to LPA because it sought to recover against the government.

According to the SJC's opinion, LPA could not recover against the City for breach of contract absent a manifestation that it "is ready, able, and willing to perform *by setting a time and place for passing papers or making some other concrete offer of performance.*" *Lafayette Place Associates v. Boston Redevelopment Auth.*, 427 Mass. 509, 520 (1998) (emphasis added). For this reason, the SJC found Campeau's letter to the City offering to "complete the transaction and make payment immediately" insufficient. But Massachusetts law has never required such a formality.

The principal case relied on by the SJC for this prerequisite to recovery requires only "some offer of performance," *Leigh v. Rule*, 331 Mass. 664, 668 (1954), and the other cases relied on by the SJC are largely inapposite. While plaintiffs had set a time and place for performance in the other three cases the SJC cited, in none of them was being ready, willing, and able the critical issue, and none of them in any way set a *minimum standard*. *See LeBlanc v. Molloy*, 335 Mass. 636, 637-38 (1957) (whether plaintiffs had right to set the place for performance when not specified in contract and where defendants did not object to place chosen); *Fox of Boylston Street Ltd. Partnership v. Mayor of Boston*, 418 Mass. 816, 818 (1994) (statute of limitations); *Bucciero v. Drinkwater*, 13 Mass. App. Ct. 551, 553-56 (1982) (whether disagreement over payment of taxes rendered contract void).

Finally, the SJC relied on *Mayer v. Boston Metro. Airport, Inc.*, 355 Mass. 344, 350-52, 354-55 (1969), in which plaintiff's recovery was *denied* despite his notification that he would appear with the required consideration at the Registry of Deeds on a date certain. The case merely stands for the unrelated proposition that a plaintiff cannot recover where he manifests a refusal to accept performance on the contract terms. The date and time aspect of the offer was irrelevant. Consequently, the SJC's sole support for its new rule that a plaintiff must offer performance *at a certain time and place* is a 1954 decision requiring "some offer of performance," and a handful of inapposite cases in which the action now *required* of LPA had *incidentally* occurred.

The extent of the surprise in the SJC's holding is aptly demonstrated by the fact that the City, despite extensive briefing by highly skilled outside counsel, never made the argument relied on by the SJC. Indeed, in the course of its 79 pages of briefing the City never even cited a single case relied on by the SJC in its holding on lack of breach.[10] The City never argued on appeal that LPA or Campeau were not ready, willing, and able to perform,[11] but rather contended that LPA lost its rights by its transfer to Campeau, and that the City's undisputed failure to obtain appraisals and its statements of non-performance made in official proceedings did not amount to material breach.

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[10] The trial judge also detected no such rule in denying the City's judgment n.o.v.

[11] This highlights the SJC's action in ignoring its long-standing rule against reversing a lower court judgment on a ground neither raised below or on appeal. *See, e.g., Cacicio v. Secretary of Public Safety*, 422 Mass. 764, 769 n. 9 (1996).

Second, the SJC substantially raised the bar for submission to the jury on the question of whether LPA's further performance was excused by the City's repeated unwillingness to perform its contractual obligations. Where a party expresses a clear intention not to perform or where a party is in material breach, the plaintiff is excused from offering performance. *See Hastings Assoc., Inc. v. Local 369 Building Fund, Inc.*, 42 Mass. App. Ct. 162, 171 (1997). Whether such performance is excused is an issue of fact for the jury. *Ibid.* Here, however, the SJC concluded that LPA had introduced insufficient evidence to present the matter to the jury. It held this in spite of evidence, *inter alia*, that: the City repeatedly expressed its intent not to perform; made plans for a through road, which would have made building on the Parcel impossible; refused to complete the appraisals that it was required to obtain[12] or to define the final borders of the property; and sought to have the BRA coerce more money from LPA in order to approve the sale to Campeau. On this evidence, the jury easily could have found either that the City was in breach or had manifested a clear intent not to perform.[13]

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[12] The SJC faults LPA for not invoking arbitration procedures in the contract designed to resolve disputes over valuation. But, neither the City nor LPA objected to any appraisals of the property. Rather, LPA could not get the City to move forward by obtaining the property boundaries or getting the remaining appraisals. Since the arbitration procedures required the City's active participation by picking an appraiser, the jury could well have concluded LPA's invocation of those procedures would have been futile. *See Hastings Assoc.*, 42 Mass. App. Ct. at 171.

[13] Given the jury's consistent special findings against the City and for LPA, it likely would have found LPA excused from its obligations because of the City's actions, had that issue been put before it. LPA should at least have had the opportunity to have that question decided by the jury. *Hastings Assoc.*, 42 Mass App. Ct. at 171.

Third, the SJC held for the first time that it would hold private entities contracting with the government to a higher standard than when dealing with each other.[14]

> This is particularly true in a complex and heavily regulated transaction such as this one, where public entities and public and elected officials with changing policies and constituencies are involved, and the transaction spans many years. This is not to say that governments are absolved from performing contractual obligations, but where a government contract specifies procedures and methods a private party must be particularly assiduous to comply with them. *'Men must turn square corners when they deal with the Government.'*

Lafayette Place, 427 Mass. at 523-24 (emphasis added).

The SJC's sole authority for this remarkable holding was a decision of this Court reviewing Internal Revenue Service procedures. *See Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920). This holding directly reverses longstanding Massachusetts precedent. *See Minton Const. Corp. v. Commonwealth*, 397 Mass. 879, 880 (1986) (the State

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[14] The City asked at trial for an instruction wholly consistent with the law as it then stood:

> For the purposes of your deliberations, it makes no difference. . . that the City of Boston. . . is. . . a large municipal entity. The City is entitled to rely on its legal rights to the same extent as any individual person. . . All persons, including the City of Boston. . . , stand equal before the law and are to be dealt with as equals in a court of justice.

"will be held answerable 'exactly as though it were a private individual.'"); *Babcock Coal Co. v. Boston*, 303 Mass. 518, 521 (1939) (State contract rules apply "to municipalities equally with other buyers").

Thus, in its decision the SJC announced a surprise new rule, ignored its own established precedent regarding whether LPA's obligations were excused; and then reversed its own precedent *sua sponte* in holding LPA to a higher standard to recover against government.

2. *Because LPA Would Have Prevailed Under the SJC's Own Prior Interpretations of State Law, the Change in State Common Law Acted to Take LPA's Property*

Absent the retroactive application of these new common law doctrines, LPA would have retained its $9.6 million judgment because the Campeau letter met the "some offer of performance" standard stated in *Leigh v. Rule*.

It is quite clear that rights in a contract may be protected property under the Takings Clause. *See United States v. Security Ind. Bank*, 459 U.S. 70, 75 (1982). *See also Armstrong*, 364 U.S. at 48 (mechanic's liens are property under Takings Clause). Thus, the SJC's retroactive imposition of new rules acted as a direct transfer of the protected property rights of a private entity to the City.

Although it is well established that, when a State takes the property of A and gives it to B, a taking may have occurred, the Takings Clause applies most definitely, and with greatest force, where the State takes a private entity's property for itself. *See Penn Central*, 438 U.S. at 124; *Eastern Enterprises*, 118 S.Ct. at

2146 ("classic taking" occurs where "government directly appropriates private property for its own use"). Therefore, this Court should apply a Takings analysis to this case.

3. *A Sharp Unexpected Retroactive Change in Common Law Can Result in a Taking*

This case "fits but awkwardly into the analytic framework" of the Takings cases.[15] *Security Ind. Bank.*, 459 U.S. at 75. While the action about which LPA complains acted to transfer directly property from a private entity to the government, it cannot reasonably be argued that this is a direct physical seizure of property. Nor does this case fit comfortably into the line of regulatory taking cases because in those cases, "the governmental action affected some but not all of the 'bundle of rights' which constitute the 'property' in question." *Ibid.* It nonetheless seems appropriate to analyze this case in the Takings context since unfair and unjust State action had the effect[16] of transferring a private entity's property to the government. Such action is at the core of the Takings Clause protection. *See Armstrong*, 364 U.S. at 48-49.

"The question of what constitutes a 'taking'... has proved to be a problem of considerable difficulty." *Penn Central* 438 U.S. at 123. The purpose of the

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[15] The Fifth Amendment Takings Clause is applicable to the states through the Fourteenth Amendment and applies to actions of State courts. *See Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 232-34 (1897).

[16] A focus on the effect of the government action, from the perspective of the owner, is entirely appropriate under the Takings Clause. Moreover, the government actors need not have intended to take property. *See Hughes v. Washington*, 389 U.S. 290, 298 (1967)(Stewart, J. concurring).

Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. The inquiry into when "fairness and justice" require compensation eschews any "set formula"; rather, the determination is based on "ad hoc, factual investigation" into "the particular circumstances" of the case. *Penn Central*, 438 U.S. at 124. This Court has articulated three factors that "have 'particular significance': (1) 'the economic impact . . . on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment - backed expectations'; and (3) 'the character of the governmental action.'" *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

a. *Economic Impact*

This first *Connolly* factor weighs strongly in LPA's favor. Expert testimony put the value of the Parcel at approximately $16.4 million more than the option price, and the jury awarded LPA $9.6 million on its contract claim.

The degree of loss is also important. That is, where government takes a valuable attribute of property, but leaves property rights which are still valuable, a taking is less likely to be found. *See Penn Central*, 438 U.S. at 136-37. However, when government action takes all or nearly all the value of the property, a compensable taking will most often be found. *See Armstrong*, 364 U.S. at 48 (complete destruction of lien held a taking); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (law making coal mining commercially impracticable a taking where that was only valuable use). Here, the SJC's new rules rendered LPA's contractual rights completely worthless.

This Court has also considered whether the government action resulted in a reciprocal benefit to the claimant. This principle is commonly cited as a justification for zoning restrictions: while one's own right to use one's property exactly as one sees fit is curtailed, one also benefits from the restrictions on one's neighbors' right to use their property in a way which is noxious or damaging. *See Pennsylvania Coal*, 260 U.S. at 415 ("an average reciprocity of advantage"). But, LPA cannot be said to have gained anything from the SJC's new rules.

b. *Reasonable Investment - Backed Expectations*

LPA invested millions of its own, borrowed $75 million more, and spent many years in building Phase I of the project, all in justifiable reliance on the City's fulfillment of its contractual obligation to sell LPA the Parcel. *Cf. Bromfield v. Treasurer & Receiver General*, 390 Mass. 665, 669 (1983) ("The presumption exists that the Commonwealth will honor its obligations"). If that reliance turned out to be misplaced, LPA fully expected it could obtain appropriate relief in the courts of Massachusetts, that it would be treated fairly by those courts, and that settled principles of contract law would be applied to it even handedly - even if the defendant was the Commonwealth's largest city. Instead, LPA spent six years in litigation, only to have its hard-won jury verdict taken from it based on new law, with which LPA could not have known it had to comply.

LPA's reliance on this settled legal principle was reasonable and justified, for the retroactive application of law can constitute a taking, largely because of its unfair disruption of settled expectations. *See Eastern Enterprises*, 118 S.Ct. at 2151-52. "Retroactivity is generally disfavored in the law, in accordance with

'fundamental notions of justice' that have been recognized throughout history." *Id.* at 2151 (numerous authorities cited)(citations omitted).

Yet common law retroactive effects have generally been considered different: "Courts, in making ad hoc adjudications, regularly apply rules and doctrines not previously announced, to prior conduct of the parties." *National Labor Relations Bd. v. Guy F. Atkinson Co.*, 195 F.2d 141, 148 (9th Cir. 1952). Because common law rules are intended to evolve and retain flexibility to adjust to new facts, reliance on the absolute consistency of common law rules would be unreasonable. *See, e.g., Duke Power Co.*, 438 U.S. at 88 n. 32. But any problem raised by retroactive application has usually been considered tolerable as State common law is assumed to be relatively stable and its evolution gradual. Where the change is more substantial, however, common law evolution begins to act much like legislation. Even then, though, this Court might be reluctant to impose any constitutional limitation on common law rule-making. The State court, in the role of a neutral arbiter, is ordinarily assumed competent to know both when its rules should apply only prospectively, and when it is fair to apply them retroactively. *See Great Northern Ry. Co. v. Sunburst Co.*, 287 U.S. 358, 364 (1932).[17] Where, however, the State or a city is before

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[17] In fact, the SJC's decision appears to fail this Court's test for applying decisions retroactively:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision. . . must establish a new principle of law . . . . Second, . . . we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and

the State court and the court has announced an unanticipated new rule to benefit the State, absolute deference to that court's judgment is not necessarily appropriate. *See United States Trust Co.*, 431 U.S. at 26 & n.25 (1977) (heightened scrutiny required where "the State's self-interest is at stake").[18] This Court has, on occasion, recognized this principle in other contexts. *See Gelpcke v. Dubuque*, 1 Wall. 175 (1863) (refusing to give effect to recent State court decision interpreting the State constitution to invalidate municipal bonds where decision overruled prior consistent precedent and would have benefitted the municipality); *Hardin v. Jordan*, 140 U.S. 371, 386-87 (1891) (disregarding State court holding inconsistent with prior State common law and law of other states); *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 416, 432 (1853) (contracts with State authorities made under old interpretation of the State constitution, which binds this Court); *Hughes*, 389 U.S. at 296-97 (declining to give effect to State court decision based

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> effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application . . . .

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971) (citations and quotations omitted). Here, the SJC decision established new law, *supra* at 12-16, its intended benefits would not be harmed by prospective application only, *infra* at 23-24, and the retroactive application worked a substantial hardship on LPA. *Supra* at 18-19. Consequently, under Supreme Court precedent, this decision should not be applied retroactively. Though the *Chevron* test has never been constitutionally mandated, something akin to the *Chevron* test might be constitutionally required, at least where the benefits of the new rule inure directly to the government at the expense of private litigants.

[18] Where it is both the State adjudicating and benefitting, such heightened scrutiny should equally apply. *See infra* at 25-28.

on State law which would have acted to transfer property from a citizen to the State: "To the extent that [the court's decision] constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate."); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-63 (1980) (disregarding State court decision that State statute created the property in question, in favor of "[t]he usual and general rule . . . that any interest . . . follows the principal," where decision resulted in "the exaction ... [of] a forced contribution to general governmental revenues..."). *Cf.* Epstein, *Takings* 96-104 (1985).

The SJC's sharp breaks with its own well settled common law precedent and its application of new legal principles in ways that directly benefitted the government, wholly disrupted LPA's reasonable expectations that it could enforce its contract according to established contract principles. Consequently the SJC's decision destroyed LPA's reasonable, investment-backed expectations.

c. *Character of Governmental Interference*

This factor ordinarily focuses on whether the governmental action can be characterized as a "physical invasion by government, [rather] than when interference arises from some public program "adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. While the governmental action operated to take all of LPA's property rights, *see Armstrong*, 364 U.S. at 48 ("the Government for its own advantage destroyed the value"); *Webb's Fabulous Pharmacies*, 449 U.S. at 163 ("[The municipality] has not merely 'adjust[ed] the benefits and burdens of economic life to promote the common good.' Rather, the exaction

is a forced contribution to general governmental revenues...") (citation omitted). This case does not fall easily into place with the physical intrusion cases. There the government physically invaded tangible property, here the SJC decision directly transferred intangible property to the government. Consequently, while the Court should consider the government's taking of the property, it requires a further analysis.

In *Eastern Enterprises*, where the taking also involved intangible property, the plurality focused on fundamental fairness and concluded that while in principle a legislative solution to the problem (health benefits for retired coal miners) made sense, the way the program worked in singling out certain employers based on long past relationships, without any relation to the propriety of their conduct, commitments, or the injury caused, was fundamentally unfair.

Similarly, here, LPA does not contend that the SJC cannot revise contract law in order to more effectively resolve contract disputes. LPA objects only to the unfair retroactive application of this new law to it, especially where the retroactive application operates to benefit government. To the extent to which the SJC can be said to be "adjusting the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124, that purpose could be accomplished well enough by the *prospective* announcement of these new rules. The SJC's *retroactive* application of its new rules only serves to insulate the City from a judgment it would otherwise have had to pay.

As in *Eastern Enterprises*, the government action at issue here, while facially an attempt to set out new rules regulating commercial relations between citizens

and government, operated in an unnecessarily unfair way as applied to LPA. Indeed, the government's action here is even more unfair than in *Eastern Enterprises* because here the government took all the resulting benefits for itself. *See Armstrong*, 364 U.S. at 48 (extinguishment of intangible property for government's benefit a taking); *Webb's Fabulous Pharmacies*, 449 U.S. at 162-63 (government's appropriation of interest in fund ruled a taking).

The SJC's decision violates the principles inherent in all three factors of this Court's Taking analysis. This Court should therefore grant certiorari and conclude that the Takings Clause protects LPA's interests.

B. Does the Retroactive Application of State Common Law Here Violate LPA's Due Process Rights?

1. *The SJC's Decision Is Reviewable Under the Principles of Due Process*

The Fourteenth Amendment's proscription that no "State [shall] deprive any person of life, liberty, or property without due process of law" was intended to protect citizens against the arbitrary exercise of State sovereign power. *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819). The protection of the due process clause applies against all exercise of State power, whether legislative, executive, or judicial. *Scott v. McNeal*, 154 U.S. 34, 45 (1894). While State court decisions based on State law are generally immune from review in federal court, *see, e.g., Central Land Co. v. Laidley*, 159 U.S. 103, 112 (1895); *Remington Paper Co. v. Watson*, 173 U.S. 443, 451-52 (1899), where "judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those

fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights,'" such decisions do not evade review. *American Ry. Express v. Kentucky*, 273 U.S. 269, 273 (1927); *see also Reynolds v. Georgia*, 640 F.2d 702, 705 (5th Cir. 1981) (an arbitrary judgment of a state court may abridge the Constitution). The SJC decision amounted to such an arbitrary exercise of State power.

2. *The Court Should Review the SJC's Decision Under a Heightened Standard of Scrutiny*

Ordinarily, the exercise of power by State officials carries with it a strong presumption of constitutionality. Such deference to State judgment, whether legislative, executive, or judicial, is justified because the State necessarily allocates rights and liabilities among private individuals and, ordinarily, there is no reason to conclude that subtle bias existed among those State decision makers.

Where, however, State actors allocate rights and liabilities between private parties and the State itself, the reasons for deference to the State are not nearly as compelling. Indeed, this Court has recognized a need for a heightened degree of oversight of the State action where the State's own interest is at stake. *See United States Trust*, 431 U.S. at 26 (heightened scrutiny appropriate where "State's self-interest is at stake");[19] *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th

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[19] Although *United States Trust* was decided under the Contracts Clause, it is directly analogous. There, State legislative acts altered contractual obligations of the State to private parties. Here, a State court decision made new law altering contractual obligations of the State to private parties.

Cir. 1992) (*United States Trust* applicable under due process analysis).

This case raises important questions about the application of such scrutiny here. The first question is whether heightened scrutiny is available where the State is overseeing not its own direct financial interests, but rather those of a municipal entity within the State. While *United States Trust* does not directly answer this question, it does suggest that heightened scrutiny is applicable to the interests of municipalities before state decision-makers. The *United States Trust* Court, in discussing the applicable standards, cited with favor a number of cases in which the Court struck down State action affecting municipal obligations as violating the Contracts Clause. *See United States Trust*, 431 U.S. at 24-25 n.22, citing, *e.g.*, *W.B. Worthen v. Kavanaugh*, 295 U.S. 56 (1935); *Louisiana v. Pilsbury*, 105 U.S. 278 (1882). That this Court has invalidated so many actions where states affected municipal obligations is telling, especially when occurring under a constitutional provision under which challenges are seldom successful. The *United States Trust* Court further noted that it had upheld State action in only one such case, and, that the State had acted there to assist the private bondholders rather than the municipality. *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942). Thus, the Court has apparently applied some heightened scrutiny in such instances. That the Court would apply heightened scrutiny in these cases is not surprising given the historically close relationship between states and their municipalities. *See Bain v. City of Springfield*, 424 Mass. 758, 768 (1997) ("It is well settled that a municipality is a creature of the state legislature for the exercise of powers as the state sees fit. . .") (citations omitted).

The second significant question this case presents for a heightened scrutiny analysis is whether it matters that the challenged action was taken by the judiciary. While the judiciary is generally thought more insulated from the vagaries of politics than the legislative and executive branches, *United States Trust* makes no express distinction among branches of government and speaks only of the state generally. Similarly, in *Hughes*, Justice Stewart's concurrence, concluding that the Washington Supreme Court's change of position constituted a "taking," did not speak in terms of heightened scrutiny, but did argue that where the decision was unprecedented and operated to the direct benefit of the government, it was not entitled to deference - even though it was a decision of the State's highest court, interpreting that State's law. *See Reynolds*, 640 F.2d at 705 (suggesting where a State court judgment operates to transfer property to the State, a due process violation is more likely). Therefore, heightened scrutiny should also apply to judicial action where a state's self-interest is at issue.

3. *The SJC's Decision Was Arbitrary and Capricious*

Even under a more exacting degree of scrutiny, violation of the due process standard is generally difficult to establish. *Wood v. Conneaut Lake Park, Inc.*, 386 F.2d 121, 124-25, (3d Cir. 1967). Mere error of State law does not constitute a constitutional violation. The decision must be "so certainly unfounded that it properly may be regarded as essentially arbitrary..." *Duane v. Merchants Legal Stamp*

Co., 231 Mass. 113, 126 (1918), quoting *Leathe v. Thomas*, 207 U.S. 93, 99 (1907).[20]

This petition has argued that the SJC's decision broke sharply with its own past precedents and that the changes unfairly took LPA's property. The earlier discussion of the retroactive application of new rules is equally relevant to the due process analysis. *See Eastern Enterprises*, 118 S.Ct. at 1258 (Kennedy, J. concurring). Though most objections to retroactivity refer to legislation, for the reasons set forth *supra* at 20-22, those same principles should apply with equal force to retroactive changes in the common law, where such changes represent a sharp break with established precedent and government is the direct beneficiary. As argued above, the SJC had no justification to apply its new rules retroactively, other than to benefit the City. *Supra* at 23-24.

Though this Court generally eschews reviewing cases simply on the basis of errors in fact finding and misapplications of State law, this appeal would help define the extent to which review is available where State courts render unprincipled and arbitrary decisions where the State's own self-interest is at stake. This Court has never articulated the due process bounds beyond which a State court may not go in reviewing civil judgments concerning its own subdivisions. This case presents an opportunity finally to do so.

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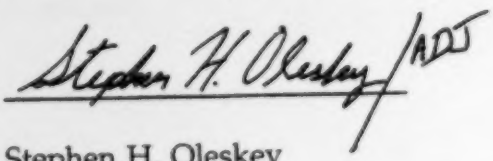
[20] A useful window into the overall attitude of the SJC in addressing LPA's claims may be found in a portion of its decision where it held that the City and BRA could not be liable under M.G.L. c. 93A, the State's unfair or deceptive trade practices provision. "It is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislative ends." *Lafayette Place*, 427 Mass. at 535.

CONCLUSION

The SJC has unfairly and unjustly applied new common law rules retroactively to LPA and thereby caused a transfer of all LPA's valuable vested contract rights to the government. The Court should determine, as it has never done, whether the Takings and Due Process Clauses of the Constitution protect private parties from such action. The Court should therefore grant a writ of certiorari.

Respectfully submitted,



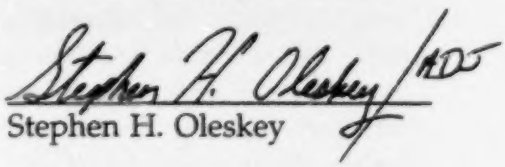
Stephen H. Oleskey
Counsel of Record
Hale and Dorr LLP
60 State Street
Boston, MA 02109

Alan Dershowitz
Of Counsel
1575 Massachusetts Avenue
Cambridge, MA 02138

November 25, 1998

CERTIFICATE OF SERVICE

Stephen H. Oleskey hereby certifies under the pains and penalties of perjury that he caused a true copy of the Lafayette Place Associates Petition for Writ of Certiorari to be served on November 25, 1998 by hand upon Rory Fitzpatrick, Esq., Kirkpatrick & Lockhart LLP, One International Place, Boston, MA 02110-2637, special counsel for the City of Boston.



Stephen H. Oleskey

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

LAFAYETTE PLACE ASSOCIATES,
PETITIONER,

v.

CITY OF BOSTON,
RESPONDENT.

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court Of Massachusetts

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Stephen H. Oleskey
Counsel of Record
Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Alan M. Dershowitz
Of Counsel
1575 Massachusetts Avenue
Cambridge, MA 02138-2801
(617) 495-4617

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APPENDIX A

HALE AND DORR LLP
COUNSELLORS AT LAW

60 STATE STREET, BOSTON, MASSACHUSETTS 02109
617-526-6000 • FAX 617-526-5000

STEPHEN H. OLESKEY
617-526-6544
stephen.oleskey@haledorr.com

June 10, 1998

BY HAND

Honorable Herbert P. Wilkins
Chief Justice
Supreme Judicial Court
New Court House
Pemberton Square
Boston, MA 02108

Re: Lafayette Place Associates v. Boston Redevelopment Authority and City of Boston, No. SJC-07596

Dear Chief Justice Wilkins:

This letter is a petition for rehearing of the Court's May 20, 1998 Decision in this matter as it affects the jury verdict and judgment against the City of Boston. The plaintiff, Lafayette Place Associates ("LPA"), respectfully submits that rehearing should be granted because the Court's decision, which departs from settled law on the standard of review for jury verdicts and rests on

misapprehensions as to questions of both fact and law, undermines long-settled principles respecting the sanctity of jury verdicts in Massachusetts, and will adversely effect the willingness of private citizens to do business with, and repose trust in, their government.

1. *The Court Failed To Afford Due Deference to the Jury's Findings*

In vacating the $9.6 million jury verdict against the City of Boston, the Court failed to accord due respect to the deliberations of a jury of twelve Suffolk County residents, who rendered a verdict on nine special questions after sitting through twelve days of evidence, hearing eleven witnesses and reviewing 82 exhibits.[1] As its 28-page decision makes plain, the Court undertook its own independent review and weighing of the evidence in a manner inconsistent both with the deference it has long properly insisted should be accorded to jury verdicts in this Commonwealth, and with the fundamental axiom that the evidence, on appeal, must be construed in the light most favorable to the plaintiff.

The Court's disregard for the jury's verdict and deliberations erodes the basic tenet, incorporated in the Massachusetts Declaration of Rights, Article 15, that "[i]n *all*

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[1] The unanimous verdict (which, as rendered, totalled $16 million, including a $6.4 million award against the BRA) might be thought the more convincing as the jurors must have understood it would necessarily be paid by them and by their fellow taxpayers. After lengthy briefing and argument on the City's post trial motions, the jury's verdict was thereafter sustained by the trial judge, the Chief Justice of the Superior Court, who heard all the evidence and observed all the witnesses.

controversies concerning property and in *all* suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as shall relate to mariners' wages, the legislature shall hereafter find it necessary to alter it." (emphasis added). Indeed, as this Court has previously observed, "[t]he jury system, as the 'sacred' method for resolving factual disputes, is the most important means by which a layperson can participate in and understand the legal system." *Dalis v. Buyer Advert., Inc.*, 418 Mass. 220, 222 (1994). The jury system serves to bring "'the rules of law to the touchstone of common sense.' . . . 'Jurors bring to a case their common sense and community values, their very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye.'" *Id.* at 222 (citations omitted).

In light of the central importance of the jury process to our system of civil justice, the standard for overturning a jury verdict is a necessarily stringent one: "in this Commonwealth . . . a verdict will not be directed for a party unless the evidence when construed most favorably to the opposite party would not warrant a contrary verdict, or unless evidence by which such opposite party is bound would make impossible a verdict in his favor." *Salem Trust Co. v. Deery*, 289 Mass. 431, 433 (1935); *see also Abraham v. Woburn*, 383 Mass. 724, 727 (1981)(in reviewing the denial of a motion for judgment notwithstanding the verdict, the standard is "whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'")(citation omitted); *Poirier v.*

Plymouth, 374 Mass. 206, 212 (1978)(same). The Court's decision does not even apply or mention this controlling standard of review.[2]

Indeed, the Court's conclusions — that LPA failed to make an adequate tender of payment to the City and that LPA was not excused from making such a tender by virtue of the City's bad faith actions and stated intentions to abandon the Tripartite Agreement — are particularly troubling given the well-established rule that factual issues relative to the sufficiency of performance under a contract and the materiality of a breach lie peculiarly within the province of the factfinder. *See Boothby v. Texton, Inc.*, 414 Mass. 468, 481 (1993)("The question of satisfactory performance is a question of fact for the jury"); *Charles River Constr. Co., Inc. v. Kirksay*, 20 Mass. App. Ct. 333, 340, n.6 (1985)(question of whether breach was material "was a question of fact for the jury, the answer to which must be upheld if there is support for it in the record.")

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[2] Notably absent from the Court's 28-page decision overturning the $9.6 million jury verdict is any reference to the appropriate standard of review. The Court's holding only highlights this omission. "The jury returned a special verdict that affirmed that L.P.A. perform[ed] its obligations under the contract. This verdict was incorrect as a matter of law, *given the fact* that LPA fulfilled none of the obligations set out above." *See Lafayette Place Assocs. v. Boston Redevelopment Authority*, 427 Mass. 509, 527 n.23 (1998)(emphasis added). The highlighted language of the footnote is telling: the standard of review applied plainly appears to be the substitution of the Court's view of the facts for the jury's.

a. The Court Erred In Concluding That LPA Did Not Fulfill Its Obligations Under the Tripartite Agreement

LPA respectfully suggests that the Court misapprehended both the law and the facts of the case in concluding that LPA failed to fulfill its obligations under the Tripartite Agreement by virtue of failing to make a sufficient tender. When the record is viewed as a whole, the jury had ample evidence upon which to conclude that LPA stood ready, willing, and able to tender the amount due for the Hayward Parcel and would have done so, had the City and BRA not thwarted its efforts to acquire the parcel.

i. The Evidentiary Requirements For Adequate Tender Are Not Reflected In The Decision

In its opinion, the Court states that "[t]o place a seller in default, a buyer must manifest that he is ready, able, and willing to perform *by setting a time and place for passing papers or making some other concrete offer of performance*." *Lafayette*, 427 Mass. at 520 (emphasis added). Nowhere, however, do the decisions cited by the Court specify the precise manner in which a buyer must demonstrate that it is "ready, able, and willing" to perform, or require that a time and place be designated for the passing of papers. To the contrary, the cases merely require evidence of ability and willingness to make tender and manifestation of such willingness and ability "by some offer of performance." *See Leigh v. Rule*, 331 Mass. 664, 668 (1954); *LeBlanc v. Molloy*, 335 Mass. 636, 638 (1957); and *Mayer v. Boston Metro. Airport, Inc.*, 355 Mass. 344, 350-352,

354-55 (1969). Based on well-settled law, the specificity of the tender and its sufficiency have been consistently regarded by this Court as dependent upon the evidence as a whole.[3]

ii. The Evidence Was Sufficient For The Jury To Conclude That LPA Performed Its Obligations Under the Agreement

Although LPA never claimed that it sent a letter to the City specifying a precise time and place for tender of payment, the jury had before it more than sufficient evidence that LPA was ready, willing, and able to pay the option price for the Hayward Parcel.[4] In this

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[3] The Court's Decision does not explain why, in light of its own precedent, the specification of time and place should be such critical elements of a tender in these circumstances. Details regarding a specific time and place for tender would have added little of significance to Mr. Campeau's written offer to Mayor Flynn (A811) to "make payment immediately" for the Hayward Parcel insofar as Mr. Campeau's letter appears to be an open invitation for the City to unilaterally select the time and place for tender.

[4] Another example of the Court's misapprehension of the facts is reflected in its comment that "It was also unhelpful of Campeau to send this 'tender' to Mayor Flynn . . ." *Lafayette*, 427 Mass. at 521, n.13. The evidence was undisputed that the City owned the Hayward Parcel, and dealt with LPA through the Real Property Board and Real Property Department, both headed by Commissioner Roche, who reported to Mayor Flynn. (Campeau was also dealing directly with the Mayor on its huge "Boston Crossing" project). Only the City, as owner, not the BRA, as the development entity, could convey the property. (A758-60). This fact was the centerpiece of the BRA's defense to LPA's contract claim against it for breach of the Tripartite Agreement.

regard, the jury heard evidence that LPA repeatedly asked the City to complete the 1978 appraisals of parcel D-4 and New Essex Street, so that the purchase price could be calculated. (A1108, 1126, 2770-2771, 2804-2807). In addition, the jury heard Mr. Ransen, LPA's principal, testify that he would have purchased the Hayward Parcel, whether or not the design review process was completed. (A3360-61). Finally, the jury heard evidence that Campeau, which stepped into LPA's shoes in March, 1988, was ready, willing, and able to purchase the Hayward Parcel in December 1988. (A3748, 3752). On this basis, the jury had more than sufficient evidence upon which to conclude that LPA (and later Campeau) was ready, willing and able to purchase the Hayward Parcel at the option price.

In addition to the evidence heard by the jury, as the Court's Decision recognized at 427 Mass. at 520, LPA sought to introduce into evidence (over repeated objections by the City and the BRA) a letter from Robert Campeau to Mayor Flynn offering to make payment for the Hayward Parcel "immediately." (A811). Such an unequivocal offer to make payment could only have given the jury more evidence upon which to conclude that Campeau was ready, willing and able to perform under the contract.

b. The Evidence Was Sufficient for the Jury to Conclude That Any Tender By LPA or Campeau Would Have Been Futile Given the City's Clear Intention To Abandon the Agreement

Although the Court acknowledges that LPA would be excused from its obligation to tender if "the city's tactics and delays demonstrated that it would not perform under

the contract," *Lafayette*, 427 Mass. at 522, the Court fails to apply the proper standard of review when examining the evidence on that issue, and thereby reaches an erroneous result.

Indeed, the Court, acting as if it were the proper factfinder, actually sifts through the evidence, resolving conflicts in favor of the City, rather than LPA, as required under the appropriate standard of review. For example, the Court interprets the testimony of Marco Ottieri — that LPA would have purchased the Hayward Parcel even if unfavorable zoning was imposed — as seriously weakening the inference that the City's zoning activities with regard to the Hayward Parcel evidenced the City's unwillingness to perform under the Agreement. *Lafayette*, 427 Mass. at 523. Such an inference was not proper since a reasonable factfinder might very well have concluded that evidence of LPA's hypothetical response to the City's zoning activities was irrelevant to a determination whether such activities manifested the City's unwillingness to perform its obligations under the Tripartite Agreement. Alternatively, a reasonable factfinder could have concluded that even though LPA would have proceeded to exercise its option if it believed it could proceed profitably, the City's actions with regard to zoning and otherwise materially affected the transaction. In drawing this inference adverse to LPA, therefore, the Court violated its own rule that "as long as the jury's verdict is supported by reasonable inferences, we will not substitute our interpretation of the facts for theirs." *Abraham*, 383 Mass. at 730.

The Court also ignores or simply fails to draw the permissible inference the jury was entitled to draw in favor

of LPA from other evidence which demonstrated the City's repeated efforts to block the acquisition, including: (1) the City's failure to obtain the appraisals of Parcel D-4 and New Essex Street despite repeated requests from LPA[5] (A1108, 1126, 2770-2771, 2804-2807); (2) the City's active pursuit of plans (continuing through the end of the option period) to build a road through the middle of the Hayward Parcel (A2504-2510, 4457-4459, 4461); and (3) the City's

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[5] The Court's conclusion that the City's failure to obtain appraisals for D-4 and New Essex Street was immaterial, 427 Mass. at 522, n.15, also directly contravenes the principle that determination of whether a breach is material is a "question for the jury." *Hastings Assocs. Inc. v. Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 171 (1997). *See also Charles River Constr. Co.*, 20 Mass. App. Ct. at 340 n.6.

obstruction of the design review process for Phase II.[6] (A3167-9, 3357, 1112, 3167).

In addition, the Court, in analyzing the factual issue of whether a tender would have been futile, ignores or downplays evidence that the City wished and intended to "abandon" the Tripartite Agreement because it was too favorable to LPA. Such evidence included: (1) statements by BRA Director Coyle that the City wanted a higher value for the Hayward Parcel (A2678, 3185, 3168-69); (2) meeting minutes of the Real Property Board in which the Board "expressed its desire . . . to receive the fair market value for

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[6] There was substantial evidence that LPA intended from 1978 on to build Phase II and that it believed the success of the mall on Phase I was inextricably related to LPA's ability to construct a department store on the Hayward Parcel. (A2660, 3190, 3387). Moreover, the Second Amendment of February 26, 1982, expressly recognized that the City had *already* demolished the parking garage (A1080); LPA's ability to develop Phase II, was therefore, *not* "contingent upon the City's decision to remove the parking structure" on the Hayward Parcel after that date. (*Cf. Lafayette*, 427 Mass. at 510-11). As a consequence of this misapprehension of facts before the jury, the Court's decision fails to acknowledge the critical fact that completion of Phase II was essential to the success of Phase I, and that it was vital for LPA to acquire the Hayward Parcel to build the second department store needed to make Phase I profitable. (Jordan's was already physically connected to Phase I to the east). While the Court was influenced in its analysis by the failure of Phase I, *id.* at 410, n.2, the jury heard and must have accepted testimony that the failure of Phase I was caused directly by Campeau's actions in deliberately emptying the mall of all tenants preliminary to its planned "Boston Crossing" redevelopment (A3379, 3381-82). The resulting bank foreclosure left LPA with no mall asset and therefore with no reason to seek an "arbitration remedy" for its inability to acquire the Hayward Parcel; without Phase I, it had no reason to acquire Phase II. As the jury understood and accepted, LPA's only recourse thereafter was to pursue first Campeau and then the City for money damages.

the Hayward Parcel (abandoning the Tripartite Agreement)") (A1875); (3) a memo from Chairman Roche of the Real Property Board to Mayor Flynn complaining about the "monetary windfall" that would accrue to LPA if "the BRA and the City allow the sale or transfer to occur" (A2503); and (4) the City's refusal to complete the 1979 appraisals, a necessary predicate to determining the purchase price.[7] Based on such evidence, the jury certainly could have concluded that any tender of payment by LPA would have been futile. *See Hastings Assocs.*, 42 Mass. App. Ct. at 171 ("Once the defendant indicated to the plaintiff that the defendant would not fulfill its obligations, the defendant was in default and the plaintiff was not obliged to go through the 'empty ceremony' of selecting a third party to determine the formula for valuing the business")(citation omitted).

In light of the controlling standard of review — "whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff'" — the Court erred in making its own

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[7] In a further example of the Court reviewing and assessing evidence heard and weighed by the jury, the Court notes that "The City argues . . . that the appraisals for [D-1 to D-3] sufficed to determine the value of D-4, . . . a very small part of the overall parcel." *Lafayette*, 427 Mass. at 522, n. 15. But the jury surely had the right to weigh this refusal to act, in context, as additional evidence of the City's decision that it would not abide by the contract to sell the land. This is not a trivial evidentiary point, since this appraisal and that of New Essex Street, was unequivocally the City's obligation. (A959). While the City took steps to begin these appraisals, it then stopped suddenly; at trial it offered no explanation for its behavior, a fact which the jury could have viewed as consistent with the City's other actions. (*Cf. id.* at 521-22).

finding that the jury could not have concluded that "the City's tactics and delays demonstrated that it would not perform under the contract."[8] *Lafayette*, 427 Mass. at 522.

2. *The Court's Decision Violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution*

In reaching its result, the Court overlooked settled law concerning the appropriate standard of review to be applied upon review of a denial of judgment notwithstanding a jury verdict. More specifically, the Court conducted its own review of the evidence, drew inferences against, rather than in favor of LPA, discounted or disregarded entirely certain evidence favorable to LPA, and then applied the law to the facts it had improperly determined. In so doing, the Court utterly failed to give the deference to the jury's verdict that is required under the long-standing law of the Commonwealth and the United States and thereby effectively deprived LPA of its right to a jury trial. Indeed, the Court, by virtue of its

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[8] As a procedural matter, the jury did not even address the issue whether LPA's failure to perform its obligations under the contract was due to "the city's tactics and delays." In fact, the special verdict form instructed the jury *not* to consider the question unless it concluded that LPA *had not* performed its obligations under the Agreement. (*See* A710). Since the jury concluded that LPA *had* fulfilled its obligations under the Agreement, it properly did not address the issue whether LPA was excused from performance. At the very least, LPA is entitled to have a jury pass on the issue whether LPA's alleged failure to make a sufficiently definite tender was the result of the City's actions. This Court, which has not heard the evidence or observed the witnesses, should not determine such a fact-intensive issue.

decision, took LPA's property interest in the Hayward Parcel as set forth in Section 6.02 of the Tripartite Agreement, and gave it to the City of Boston. Such arbitrary and capricious conduct constitutes a violation of LPA's Fourteenth Amendment right to due process.

3. *In Reaching Its Decision, the Court Relied on Legal Issues That Had Not Been Raised With Sufficient Particularity Either at Trial or On Appeal*

The Court's opinion relies on many issues that had not been briefed or raised by the parties in any meaningful way, either in the trial court or in the appellate briefs. The Court's own analysis of such issues contravenes the general principle that issues not raised are waived, *Still v. Comm'r of Employment and Training*, 423 Mass. 805, 808 n.3 (1996), and that issues not briefed on appeal with sufficient adequacy shall not be addressed. *Shafnacker v. Raymond James & Assoc., Inc.*, 425 Mass. 724, 735 n.14 (1997).

a. *The City Did Not Raise in a Timely Fashion the Issue of LPA's Failure to Invoke the Arbitration Clause*

Although the Court faults LPA for failing to avail itself of the arbitration procedure contained in the Tripartite Agreement, a review of the record demonstrates that the City did not assert the arbitration procedure as a defense in a timely fashion as required by Mass.R.Civ.P. 8(c), and therefore cannot be allowed to rely on the arbitration clause to avoid its obligations. The City did not raise LPA's failure to arbitrate as an affirmative defense in its Answer (A39), its Summary Judgment motions (A55,

498), its Statement of Outstanding Issues (A491), or its Trial Memorandum (A575). Indeed, the first reference by the City to arbitration came at the end of all the evidence at the trial, after more than two years of litigation, including substantial discovery.[9] Moreover, the law is settled that by proceeding through discovery and trial, the City waived its right to resort to arbitration. *See Home Gas Corp. of Mass., Inc. v. Walter's of Hadley, Inc.*, 403 Mass. 772, 778 (1989)(right to arbitration waived after one year of discovery, fourteen-day hearing and report by master).

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[9] The City filed no motion for a Directed Verdict at the close of LPA's case. The City's first claim that arbitration was LPA's only remedy came in its Requested Jury Instructions (A698); when they were not given, the City failed to preserve its rights by not objecting.

b. The City Never Challenged the Trial Court's Instructions to the Jury On LPA's Performance Under the Tripartite Agreement

Although the Court holds that LPA's failure to invoke the procedural remedies in the Tripartite Agreement precludes it "as a matter of law" from putting the City in default, the record indicates that the jury was not so instructed and that the City voiced no objection to the trial court's instruction as to LPA's obligations under the Tripartite Agreement:

> Question 2: Did LPA perform its obligations under the contract? Did LPA do what it was supposed to do? Did it do what it was supposed to do pursuant to the terms and conditions of the contract? One cannot seek to enforce a contract unless one lives up to and meets its obligations under the contract.

(A4688).

c. The City Never Challenged the Trial Court's Instructions on the Issue Of Whether LPA Was Excused from Performing By Virtue of the City's Conduct

Similarly, although the Court analyzes the issue whether the evidence could have supported a finding that LPA was excused from tendering payment by virtue of the

City's conduct, the record demonstrates that the City failed to object to the following instructions given by the Court:

> The question is: If LPA did not perform its obligations . . . under the contract, was its failure to perform caused solely — by that it means was the only cause, the only cause for its failure to perform — was its exclusive cause for its failure to perform a material breach by the City of Boston. In other words, did the failure of the City of Boston to meet its obligations under the contract, was that the cause . . . of LPA not meeting its obligations under the contract.

(A4688-89). Nor did the City request any further instructions on LPA's obligations under the Tripartite Agreement. Under such circumstances, the City should not even be allowed to raise this issue on appeal and this Court certainly should not rely on the issue as dispositive of a multi-million dollar jury verdict which followed instructions as to which no objection was made.

4. *The Court's Decision, Which Holds Private Parties to a Heightened Standard of Care When Transacting Business With Governmental Entities, Is Not Supported by Settled Precedent and is Unsound and Unfair Judicial Policy*

The Court's decision rests in significant measure on the principle that commercial transactions involving municipalities require different standards from those between private parties. More specifically, in reaching the conclusion that LPA failed to make an adequate tender of

payment for the option parcel, the Court relies upon dicta in a 1920 United States Supreme Court decision involving Internal Revenue Service procedure, which states that, "'Men must turn square corners when they deal with the Government.'" *See Lafayette*, 427 Mass. at 524 (*quoting Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920)). Moreover, the Court places special emphasis on citizens being "particularly assiduous" in using available "procedural devices" in transactions involving government "particularly . . . in a complex and heavily regulated transaction . . . where public entities and public and elected officials with changing policies and constituencies are involved, and the transaction spans many years." *Lafayette*, 427 Mass. at 523-24. Finally, in the portion of the opinion rejecting LPA's 93A claims against the City and BRA, the Court stated even more starkly: "It is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislatively mandated ends." The Court has apparently overlooked its decision in *Commonwealth v. Boston Redevelopment Authority*, 418 Mass. 29, 32, n.3 (1994), in which it summarily rejected the BRA's transparent effort to advance its "legislatively mandated ends" through actions intended to force the Commonwealth itself to renegotiate the purchase price for the land for the new courthouse. *Cf. Lafayette*, 427 Mass. at 535-36.

These principles are contrary to well-settled and well-reasoned precedent in the Commonwealth that, in contract actions, the state "will be held answerable 'exactly as though it were a private individual.'" *Minton Const. Corp. v. Commonwealth*, 397 Mass. 879, 880 (1986); *Babcock Coal Co. v. Boston*, 303 Mass. 518, 521 (1939)(finding general commercial contract rules apply "to municipalities equally

with other buyers"); *Space Master Intern., Inc. v. City of Worcester*, 940 F.2d 16, 19 (1st Cir. 1991)("Massachusetts applies general principles of contract law to public contracts"); *see also Bromfield v. Treasurer & Receiver General*, 390 Mass. 665, 669 (1983)("The presumption exists that the Commonwealth will honor its obligations.")

Indeed, the City did not even dare to argue below that it should be treated other than as a private citizen in this context, and in fact requested the following instruction be given to the jury at trial:

> For the purpose of your deliberations, it makes no difference, and you should not consider, that the City of Boston . . . is . . . a large municipal entity. The City is entitled to rely on its legal rights to the same extent as any individual person. Just as an individual's means are irrelevant to your determination of his or her legal rights and obligations, so are those of the City . . .. *All persons, including the City of Boston . . ., stand equal before the law and are to be dealt with as equals in a court of justice.*

(A659)(emphasis added).

That elected officials, their "constituencies" and "policies" change over time ought in truth to be all the more reason for citizens to be able to enforce contracts made by one administration on behalf of a city against that city later, no matter what changes elections have wrought. Here, one Mayor, Kevin White, his BRA Director, Robert Kenney and his Real Property Commissioner, Joanne Prevost, in a contract approved by the City Council,

squarely committed the City and its agencies in 1978 to sell property to LPA at a much later date so long as LPA built Phase I and became entitled to trigger its Phase II option — the carrot dangled by the City in its successful effort to induce LPA to invest well over $100 million in a highly risky ten-year commitment in a vital but decrepit portion of the City's Central Business District. Ten years later, with a new Mayor, Raymond Flynn, a new BRA Director, Stephen Coyle, and a new Real Property Commissioner, Edward Roche, "constituencies" and city "policies" had most assuredly changed. In such foreseeable and repetitive circumstances, requiring government, like private citizens, to live strictly with its contractual commitments, particular with those agreements successor officials perceive and publicly proclaim to be no longer advantageous enough to perform, should be a judicial imperative.

The import of the Court's decision — that government in the pursuit of its objectives will be given a latitude to conduct itself in a manner that would be unacceptable and sanctionable in a private citizen (cf. *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 475 (1991), cited by the Court in *Lafayette* at 535) — is not only contrary to all citizens' reasonable expectations that government will (as it should) behave decently and honestly in its dealings with them, but is also a highly disturbing principle and precedent for this Court to advance.

For all of the above-stated reasons, LPA respectfully requests that the Court grant its petition for rehearing. LPA requests oral argument on its petition.

Very truly yours,

Stephen H. Oleskey
Lisa J. Pirozzolo

cc: David Wanger, Esq.
Rory Fitzpatrick, Esq.
Saul A. Schapiro, Esq.

APPENDIX B

LAFAYETTE PLACE ASSOCIATES *vs.* BOSTON REDEVELOPMENT AUTHORITY & another.[10]

Suffolk, March 9, 1998. — May 20, 1998.

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, FRIED, MARSHALL, & IRELAND, JJ.

Contract, What constitutes, Construction of contract. Performance and breach. *Boston. Redevelopment Authority. Municipal Corporations,* Contracts. *Governmental Immunity. Massachusetts Tort Claims Act. Consumer Protection Act,* Unfair or deceptive act, Trade or commerce.

The terms of an agreement, as amended, between the city of Boston, the Boston Redevelopment Authority, and a developer were sufficiently definite to constitute a valid and enforceable contract [517-519], however, where a bilateral contract for the purchase and sale of a certain parcel of real estate arose upon the developer's exercise of an option under the agreement and where, thereafter, neither the developer nor the city tendered performance, neither party was in breach or default of the agreement, which then expired by its own terms [519-527]

In a civil action, the judge did not abuse his discretion in ruling that the Boston Redevelopment Authority had timely raised the defense of immunity under the Massachusetts Tort Claims Act, G.L. c. 258, § 10(*c*). [527-528]

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[10] City of Boston.

This court concluded that the Boston Redevelopment Authority is a public employer under the Massachusetts Tort Claims Act, and, as such, the provisions of G.L. c. 258, § 10(*c*), confer upon it immunity from liability for intentional torts. [528-535]

In a G.L. c. 93A claim brought by a developer against the city of Boston and the Boston Redevelopment Authority, the judge correctly allowed the defendants' motion for summary judgment where the defendants' transactions with the plaintiff were wholly in pursuit of the legislatively prescribed redevelopment mandate of G.L. c. 121A, § 2, and did not constitute "trade or commerce." [535-536]

CIVIL ACTION commenced in the Superior Court Department on March 16, 1992.

A motion for summary judgment was heard by *Hiller B. Zobel*, J., and the case was tried before *Robert A. Mulligan*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Stephen H. Oleskey (*Lisa J. Pirozzolo* with him) for the plaintiff.

Saul A. Schapiro (*Nina F. Lempert* with him) for Boston Redevelopment Authority.

Rory FitzPatrick (*Irene C. Freidel* & *Merita Hopkins* with him) for the city of Boston.

FRIED, J. A jury found the defendants, the city of Boston (city) and the Boston Redevelopment Authority (BRA), liable for monetary damages for having breached a contract with the plaintiff, Lafayette Place Associates (LPA), for the sale of certain land (Hayward Parcel), and the BRA liable for the tort

of intentional interference with LPA's contractual relation with another entity, Campeau Massachusetts, Inc. (Campeau). The trial judge entered judgment against the city, and granted judgment notwithstanding the verdict in favor of the BRA, on the ground that it was not amenable to suit for an intentional tort. We conclude that there was a valid contract between the city and LPA but that the city did not breach it. We also affirm the judgment entered in favor of the BRA, and the dismissal of LPA's claims under G.L. c. 93A.

I

This dispute arises out of efforts going back to the administration of Boston Mayor Kevin White in the late 1970's to rehabilitate the "Combat Zone," a dilapidated area adjacent to a shopping area on Washington Street. A grand scheme was devised by LPA's entrepreneurs for the construction of a department store, a retail mall, and a hotel in the area. In 1978, an agreement (Tripartite Agreement) was signed between LPA, the city, and the BRA for the development of the area in two phases. Phase I was to encompass a shopping mall and a hotel and was eventually built.[11] It is not a subject of these suits. Phase II was to include one or more office buildings, further retail space, and a department store. It was to be built on four parcels of land to be assembled into a single parcel, called the Hayward Parcel, at the time partially occupied by a city parking structure, the Hayward Place parking garage. Whether Phase II would ever be undertaken was made contingent in the

[11] The shopping mall, Lafayette Place Mall, was not a success. The bank that held the mortgage foreclosed on it on February 5, 1991. The hotel, originally known as the Lafayette Hotel, has been operating successfully as the Swissôtel and separated itself from the development.

Tripartite Agreement on the city's decision to remove the parking structure. If it did, the city would still be allowed to build an underground parking garage on the site with LPA being granted air rights to build over it.

The agreement as to the development of the Hayward Parcel was principally set out in Section 6.02 of the Tripartite Agreement. Section 6.02 is expressed in terms of the grant of an option to LPA to purchase the Hayward Parcel. The option is contingent on notice by the city that it plans to discontinue the Hayward Place garage. By agreement, LPA could thereupon notify the city within the option period if it "desires to purchase the rights hereby made available to it [and] the City shall sell the same . . ." The Tripartite Agreement and accompanying maps identify the boundaries of the Hayward Parcel, but indicate several alternatives concerning the rights to be conveyed. In the Tripartite Agreement, the city is stated to have in hand appraisals of the fair market value of two of the four component parcels of the Hayward Parcel, and agrees "forthwith" to obtain appraisals of the two remaining parcels.[12] The price to be paid was to be one-half of the appraised fair market value as of 1978, plus one-half of the increase in value attributable to "the construction of the Public Improvements and the Project."[13] In other words, the formula accounted for the possibility that between 1978 and the future sale of the Hayward Parcel, the value of the parcel could change as a result of the

[12] The city completed an appraisal of the third parcel in 1979.

[13] This was the formula to be used if the city ultimately determined, as it in fact did, that it would retain subsurface rights to build a parking garage under the Hayward Parcel. Had the city decided not to retain subsurface rights, an alternate formula provided that the purchase price would be the full fair market value as of 1978 plus one-half of any increase in value attributable to the construction of "the Public improvements and the Project."

construction of Phase I on adjacent land. The Tripartite Agreement further provided that "[t]he existence and amount of increase in fair market values attributable to the construction of the Public Improvements and the Project shall be determined by independent appraisal." Section 13.01 of the Tripartite Agreement also provides, after giving a standard definition of fair market value, that such value shall be determined by a procedure, akin to arbitration, by which by giving written notice either party may designate a first appraiser, the other party designate a second appraiser, and a third appraiser be appointed by the first and second, by the Chief Judge of the United States District Court for the District of Massachusetts, or by the president of the Boston Bar Association.[14]

The Tripartite Agreement also provides,

> "[t]he Developer may exercise the right and option set forth in this Section 6.02 by giving notice of its desire to purchase such rights to the City at any time within the Option Period. After the receipt of and following such notice from the Developer, the parties shall in good faith negotiate and enter into an agreement calling for the purchase and sale of the rights in question. Such agreement shall be in the customary form of agreements for the purchase and sale of real estate in the greater Boston area except that the agreement shall reflect such reservation and shall contain other appropriate provisions with respect to

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[14] This appraisal process was to be used to determine the fair market value of the "project rights," which included the "Developer's present and future rights in and to the Project Area." The "project area" included parcels D-1, D-2, D-3, and DA, which made up the Hayward Parcel.

> the integration of construction and other matters relevant to coordinated use of the rights conveyed and the rights retained by the City."

On February 26, 1982, the parties agreed, in what is known as the Second Supplemental Agreement, to certain changes to the Tripartite Agreement concerning the construction and operation of a parking garage by the city under the Hayward Parcel. In addition, the parties amended Section 6.02 by adding the following:

> "[I]f the Developer shall exercise the right and option set forth in this Section 6.02, there shall automatically be created an agreement by the Developer to buy and by the City to sell the . . . Parcels . . . . [A]ppropriate details of the purchase and sale shall be worked out by the parties so as to conform to their intent under this Section 6.02., but if they shall be unable to do so then the matter shall be resolved by arbitration in accordance with the arbitration procedure set forth in ARTICLE EIGHT of the Deed and Agreement, dated as of September 11, 1979, between the City and the Developer."

Article 8 of the deed sets out a binding arbitration procedure for the resolution of disputes.[15] On December 16, 1983, the city gave notice to LPA that it intended to discontinue the Hayward Place Garage and build a parking garage beneath

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[15] The September 11, 1979 deed, which was for the purchase of the "Lafayette Parcel" in connection with Phase 1, provides that "[i]f a dispute shall arise . . . and if . . . such dispute is to be settled by arbitration, then either Owner may serve upon the other Owner a notice demanding that the dispute be arbitrated . . . ." Each party is permitted to select an arbitrator, and the two chosen arbitrators then select a third.

the Hayward Parcel, thereby commencing LPA's option period. In that notice, the city listed five contingencies to closing the sale of the Hayward Parcel, including that "the parties are able to agree, via appraisals, on the increased value of parcels D-1, D-2 and D-3, as the result of the construction of the Lafayette Place Project."

On July 2, 1986, as all parties agree, LPA exercised its option to purchase the Hayward Parcel. On October 27, 1987, the parties extended the date on which closing might take place by providing, in what is known as the Third Supplemental Agreement, that:

> "Section 6.02 of the Tripartite Agreement is amended by deleting the proviso in the fourth full paragraph thereof . . . and substituting in its place the following: 'provided that, unless the City and the Developer shall agree to a further extension, the Developer shall lose its rights hereunder to proceed with an acquisition if a closing has not occurred by January 1, 1989, unless the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing.' "

By virtue of the Third Supplemental Agreement, LPA had until January 1, 1989, a date which all parties refer to as the "drop dead date," to "proceed with an acquisition."

LPA never demanded and the city never tendered a deed within the required time period or at any other time. The basis of its contract action against the city is that the city in bad faith failed to carry out those of its obligations under the Tripartite Agreement necessary to allow LPA to proceed to demand a closing, and indeed that it engaged in bad faith actions designed to impede LPA in effecting a timely closing. The reason for these obstructionist tactics by the city, as LPA

sought to show by testimony and documents, was that the new administration of Mayor Raymond Flynn believed that the price established by the Section 6.02 formula, which was based on 1978 values, was grossly unfair to the city in the light of a strong surge in real estate prices in the intervening years. LPA offered evidence of several instances of what it claimed were the city's obstructionist tactics. These included failing to complete the appraisals necessary to establish the price for the Hayward Parcel, initiating zoning changes that would have greatly reduced the allowable height of the office towers planned for the site, lack of cooperation about determining whether Avenue de Lafayette and New Essex Street would be closed, and threatening to put a new street through the middle of the parcel, which would have made its development economically unviable.

In November, 1987, after the conclusion of the Third Supplemental Agreement but before the final breakdown of dealings in 1989, LPA negotiated the sale of its development rights in the Hayward Parcel to Campeau. LPA was to receive $24.5 million in return for its rights under Phase I of the project. The sale was subject to approval by the BRA, and on December 4, 1987, LPA filed an application for approval. On February 1, 1988, LPA withdrew its application; the BRA had not acted on it in the interim. In March, 1988, LPA entered into a lease agreement with Campeau whereby Campeau assumed LPA's debts under Phase I and was to pay LPA approximately $21.5 million in cash and notes in return for LPA's rights to the project. Under the lease agreement, Campeau agreed to pay LPA additional consideration if the BRA approved the sale of the Hayward Parcel.

Thereafter, LPA was not directly involved in negotiations regarding the sale of the Hayward Parcel. Campeau began elaborate plans for a development called "Boston Crossing,"

which included construction of a department store and office tower on the Hayward Parcel, the rebuilding of the Phase I mall on its nearby parcel, and the construction of an office tower above a rebuilt Jordan Marsh. During 1988, representatives from Campeau and the BRA met repeatedly to negotiate about Campeau' s plans. When it became clear that Campeau could not secure BRA approval for the Boston Crossing project by the expiration of LPA's option period, Campeau requested a further extension of the drop dead date. The BRA refused to extend the January 1, 1989, deadline. On December 19, 1988, Campeau's president sent a letter to Mayor Flynn describing the current state of the project, renewing Campeau's request for an extension of the option period, and informing Mayor Flynn that "we have no recourse but to officially notify the city that we wish to complete the transaction and make payment immediately." On December 30, 1988, Stephen Coyle, director of the BRA, responded. He stated that, "once the development review process is complete, the City's parcel can be sold for its fair reuse value," and noted that "[b]y their own terms, prior agreements on Hayward Place will expire on January 1, 1989. This event does not in our judgment alter our willingness to work with you . . . [i]t simply puts the question of the disposition of Hayward Place in a current context."

LPA's option period expired on January 1, 1989. In June, 1989, the BRA approved Campeau's "Boston Crossing" design, but by June, 1990, Campeau had defaulted on its payments to LPA under the lease agreement and LPA terminated its lease with Campeau. Manufacturers Hanover Trust Company, as lender, foreclosed on LPA's and Campeau's interests in the Lafayette Place Mall in February, 1991, and the project collapsed. On March 16, 1992, LPA filed suit

against the city and the BRA.[16] LPA alleged that the city had breached the Tripartite Agreement by failing to work out the necessary details to effect the transfer of the Hayward Parcel after LPA exercised its option to buy, and LPA sought specific performance, or, alternatively, damages for breach of the Tripartite Agreement. LPA also sought damages for breach of the implied covenant of good faith and fair dealing, interference with contractual relations, and violation of G. L. c. 93A.

On October 21, 1994, a jury returned a verdict against the city and the BRA. The jury found that there was a contract for the purchase of the Hayward Parcel, that both the city and the BRA breached the contract, but that the BRA was not acting as an agent of the city in connection with the contract. The jury awarded LPA $9.6 million against the city. The jury also found that the BRA intentionally interfered with contractual relations between LPA and Campeau, and awarded LPA $6.4 million in damages. The trial judge then ruled that the $6.4 million verdict against the BRA was "encompassed" within the $9.6 million award against the city. On August 17, 1995, the judge granted the BRA's motion for

[16] On July 18, 1990, LPA had filed suit against Campeau, alleging that Campeau had failed to use "commercially reasonable efforts" to go forward with Phase 11, and therefore had violated the lease agreement between LPA and Campeau. in addition, LPA alleged that Campeau had failed to pay amounts due under the lease. The record does not reflect the disposition of this action.

judgment notwithstanding the verdict,[17] ruling that the BRA is a public employer under the Massachusetts Tort Claims Act and is therefore immune from suit for intentional torts. We granted LPA's application for direct appellate review.

II

The city makes two principal arguments in this appeal: that the Tripartite Agreement was too indefinite to constitute a binding contract, and that in any event the city was not in breach. Although the city treats these as quite distinct arguments we believe that they must be considered together to come to a fair and sensible view of the arrangement between the parties and their dealings with each other pursuant to it. There were certainly contingencies left open at the time that the parties concluded the Tripartite Agreement, principally the price to be paid, the treatment of Avenue de Lafayette and New Essex Street, and whether or not the city would choose to build an underground garage on the Hayward Parcel. But these open matters did not preclude the formation of a binding agreement. The parties specified formulae and procedures that would determine a price under the several contingencies. It would be most unfortunate if parties could not make binding, reliable agreements about such complex projects, allowing them to make commitments and seek financing for their conclusion. If the degree of

[17] The judge had earlier ruled that the judgment against the BRA for breach of contract could not stand because it was inconsistent with the jury's specific finding that the BRA was not an agent of the city, and that the award of dam- ages in tort against the BRA could not stand because they were subsumed in the contract damages awarded against the city. A claim against the defendants under G. L. c. 93A had been dismissed on motion for summary judgment prior to the commencement of the trial.

specificity the city claims is necessary were insisted on, no such agreements could be concluded. But it is the other side of this same coin that the procedures necessary to lend specificity to what at the outset is not entirely specific are an integral part of the agreement the parties concluded, and, if a party does not follow those procedures, it should not be able to claim that the other side is in breach of what is necessarily still an open-ended arrangement. We conclude that there was sufficient evidence to find a binding agreement, as the jury indeed did find, but it is also clear, as a matter of law, that LPA failed to follow the steps required of it under the Tripartite Agreement as supplemented to put the city in breach.

A

The first question is whether there was a valid and enforceable contract between LPA and the city or whether, as the city claims, the terms of the Tripartite Agreement as amended were too indefinite to constitute a contract. The Tripartite Agreement states that "the parties shall in good faith negotiate and enter into an agreement," which the city argues indicates that no binding agreement had been concluded. The city points out that Section 6.02 leaves undetermined the contract price and exactly what is to be included in the Hayward Parcel. In some cases, the failure to reduce uncertainties to definite terms is fatal, particularly where parties have not yet formalized their negotiations or have left essential terms completely open. See *Mendel Kern, Inc.* v. *Workshop, Inc.*, 400 Mass. 277, 280-281(1987) ("an intention to do something is not necessarily a promise to do it"); *Lucey* v. *Hero Int'l Corp.*, 361 Mass. 569, 574 (1972) (no option contract for purchase of land where parties merely specified boundaries to be "mutually agreed upon by both

parties"); *Saxon Theatre Corp. v. Sage*, 347 Mass. 662, 666 (1964) (no contract for lease of property where parties merely signed letter of intent that provided no description of the land nor means of determining rent). But see *Shayeb* v. *Holland*, 321 Mass. 429, 431(1947) (enforcing contract despite absence of price term). We adhere to the principle that "[a]n agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereto," *Rosenfeld* v. *United States Trust Co.*, 290 Mass. 210, 217 (1935), in the circumstances that justify and gave rise to it: where parties have merely reached the stage of "imperfect negotiation" prior to formalizing a contract, and have not yet reduced their agreement to terms. *Id.* When parties have progressed beyond that stage, however, a competing principle applies: a contract should be interpreted "so as to make it a valid and enforceable undertaking rather than one of no force and effect." *Shayeb* v. *Holland*, *supra* at 432. See *McMahon* v. *Monarch Life Ins. Co.*, 345 Mass. 261, 264 (1962).[18] Rules of contract must not preclude parties from binding themselves in the face of uncertainty. If parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding. See generally *Hastings Assocs.* v. *Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 169 (1997) (accepting contract calling for appointment

[18] As Judge Leval has said, "Notwithstanding the importance of protecting negotiating parties from involuntary judicially imposed contract, it is equally important that courts enforce and preserve agreements that were intended as binding, despite a need for further documentation or further negotiation. It is, of course, the aim of contract law to gratify, not to defeat, expectations that arise out of intended contractual agreement, despite informality or the need for further proceedings between the parties." (Footnotes omitted.) *Thachers Ins. Annuity Ass'n* v. *Tribune Ca*, 670 F. Supp. 491, 497-498 (S.D.N.Y. 1987).

of neutral third party to determine lease price under formula); *Cataldo* v. *Zuckerman*, 20 Mass. App. Ct. 731, 737 (1985) (accepting formula for determination of compensation as sufficiently specific to create contract).

The Tripartite Agreement provided a pricing formula to determine the price to be paid for the Hayward Parcel. When the parties signed the Tripartite Agreement, most of the information needed to complete that formula was available. Because the formula incorporated the fair market value of the parcel at the time of the future transaction, which, by definition, was unknown at the time of contracting, Section 13.01 detailed an appraisal procedure to be used for securing that information. By using that procedure, which called for the creation of a three-member appraisal board, the parties could have determined the price to be paid. In addition, the Second Supplemental Agreement states that "if the Developer shall exercise the right and option set forth in Section 6.02, there shall automatically be created an agreement by the Developer to buy and the City to sell" the Hayward Parcel. Moreover, it specified that "appropriate details of the purchase and sale . . . shall be resolved by arbitration" in accordance with a specified procedure. Although this provision was not added until 1982, it created a means for resolving disputes that might arise in the course of effecting the ultimate sale of the Hayward Parcel. In particular, questions about the exact size of the parcel and the allocation of air rights over the relevant public streets were the kind of "details" that could be worked out using this process.[19] To

[19] There is little doubt that all parties understood the general boundaries of the Hayward Parcel, given that the parcel is bounded by streets and buildings in a small city block. Although the exact details of the boundaries of the parcel might have varied depending upon what building plan was ultimately approved by the city and the BRA, this was not a situation in which the parties agreed upon the purchase of a

borrow Justice Holmes's metaphor, the machinery was built and had merely to be set in motion. See *Drummond* V. *Crane*, 159 Mass. 577, 579 (1893) (a future writing was merely "additional wheel in the machinery" of a contract). See also *Sands* v. *Arruda*, 359 Mass. 591, 594 (1971); *Coan* v. *Holbrook*, 327 Mass. 221, 224 (1951). We therefore conclude that the Tripartite Agreement, as amended, was an enforceable contract, under which both parties had certain rights and obligations.

B

Because the Tripartite Agreement, as amended, was an enforceable contract, upon LPA's exercise of its option in 1986, there arose a bilateral contract for the purchase and sale of the Hayward Parcel. See *American Oil Co.* v. *Cherubini*, 351 Mass. 581, 585 (1967) (exercise of option creates bilateral contract for purchase and sale); *C. & W Dyeing & Cleaning Co.* v. *DeQuattro*, 344 Mass. 739, 741 (1962) (same). See also *Blum* v. *Kenyon*, 29 Mass. App. Ct. 417, 420 (1990) (same). The question then becomes whether LPA can, as a matter of law, maintain a claim against the city for breach of that contract. "The general rule is that when performance under a contract is concurrent one party cannot put the other in default unless he is ready, able, and willing to perform and has manifested this by some offer of performance." *Leigh* v. *Rule*, 331 Mass. 664, 668 (1954). See 6 Corbin, Contracts § 1258 (1962). Any material failure by a plaintiff to put a defendant in breach bars recovery, see *Kanavos* v. *Hancock Bank & Trust Co.*, 395

totally unspecified or undemarcated property Compare *Lucey v. Hero Int'l Corp.*, 361 Mass. 569, 573 (1972).

Mass. 199, 202-203 (1985); *Pas-Teur, Inc.* v. *Energy Sciences, Inc.*, 11 Mass. App. Ct. 967, 968-969 (1981) (citing cases), unless the plaintiff is excused from tender because the other party has shown that he cannot or will not perform. *Leigh* v. *Rule, supra.* Even if a potential buyer notifies the seller of the buyer's intention to tender on a certain date and appears at the registry of deeds on that date with the required consideration, there may not be the "readiness to perform" that is a necessary condition of placing the defendant in breach. See *Mayer* v. *Boston Metro. Airport Inc.*, 355 Mass. 344, 350-352, 354-355 (1969).

Applying these principles to the facts most favorable to LPA in this case, the question becomes whether LPA, as a matter of law, was ready, able, and willing to close the sale of the Hayward Parcel prior to January 1, 1989, and whether LPA indicated as much to the city.[20] There is no evidence in the record, and LPA does not now argue, that LPA attempted to tender payment for the Hayward Parcel between July, 1986, when it exercised its option under the Tripartite Agreement, and March, 1988, when it transferred its rights to

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[20] The city's motion for directed verdict argued that there was no evidence to support a finding that "the plaintiff called for a closing to acquire title" to the Hayward Parcel, and that if there was a demand for closing it was insufficient. The city incorporated these defenses in its motion for judgment notwithstanding the verdict. It also argued that there was no evidence "of either the plaintiff or the city taking any steps to negotiate or enter into a purchase and sale agreement" during the option period. Moreover, the issue of LPA's failure to demand recourse to the specified arbitration procedure was raised repeatedly over the course of the litigation, including in the city's motion for special verdict, motion for directed verdict, by incorporation into its motion for judgment notwithstanding the verdict, and in the city's brief to this court. The city argued in its motion for judgment notwithstanding the verdict that LPA failed to activate the Section 13.01 appraisal procedure, and thus that the city could not be in breach.

Campeau. LPA must therefore rely on the possibility that Campeau fulfilled LPA's contractual obligations by tendering payment or demanding the deed. On December 19, 1988, less than two weeks prior to the drop dead date, Campeau informed Mayor Flynn by letter that "we have no recourse but to officially notify the city that we wish to complete the transaction and make payment immediately." This is the best evidence in the record of an attempt to tender payment to force the city to close the sale of the Hayward Parcel.[21] It is not sufficient. To place a seller in default, a buyer must manifest that he is ready, able, and willing to perform by setting a time and place for passing papers or making some other concrete offer of performance. See *Leigh* v. *Rule, supra* at 668; *LeBlanc* v. *Molloy,* 335 Mass. 636, 637-638 (1957); *Mayer* v. *Boston Metro. Airport, Inc., supra* at 354. Even attributing to LPA Campeau's action in sending the letter to Mayor Flynn (an attribution the city urges us not to make), Campeau's letter does not specify when, where, or how Campeau intends to tender payment, nor does it indicate what Campeau believes the city's obligations were at that point in time.[22] Compare *Fox of Boylston St. Ltd. Partnership* v. *Mayor of Boston,* 418 Mass. 816, 819-820 (1994) (notice letter specified closing date and location); *Bucciero* v. *Drinkwater,* 13 Mass. App. Ct. 551, 552-553 (1982) (buyer was ready, willing, and able to perform when he arrived at closing with payment). Campeau provided no suggested purchase price, nor even a

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[21] Prior to December, 1988, Campeau sent several letters to the BRA asking for an extension of the option period. In none of these letters, however, did Campeau demand tender of the deed to the Hayward Parcel or offer to tender payment.

[22] It was also unhelpful of Campeau to send this "tender" to Mayor Flynn, given that officials from both Campeau and LPA testified that they knew that the BRA, and not Mayor Flynn's office, had primary responsibility for the transaction.

suggestion as to when Campeau and the city should meet to resolve the remaining differences. Finally, this single sentence is embedded in a long letter to the mayor sent only weeks prior to the termination of the option period. It was an empty gesture that could not possibly have been acted on in the time remaining until LPA and Campeau forfeited their rights under the Tripartite Agreement.

LPA might claim that neither it nor Campeau could have tendered and thus put the city in breach, because absent a final delineation of what the parcel contained and an appraisal of what the parcel was worth there was no basis for a definitive tender. But the agreement between the parties specified mechanisms for resolving just these open questions. Indeed it is only because such mechanisms were specified that we have been willing to hold that the arrangement between the parties is definite enough to constitute a binding agreement.

Under the Section 6.02 price formula, the parties could not have completed the transaction without using the procedure set forth in Section 13.01 to determine whether any increase in the fair market value of the parcel since 1978 was attributable to the construction of Phase I. The Tripartite Agreement does not specify which party has the obligation to trigger Section 13.01's appraisal process; both parties share this responsibility. *Neither* party could be ready, able, and willing to close the sale until this procedure was at least initiated. Given that this information had not been obtained, and that neither LPA nor Campeau ever sought to obtain it, LPA cannot, as a matter of law, have put the city in default. See *Kanavos* v. *Hancock Bank & Trust, supra* at 203 ("[i]f neither could perform, even if the [defendant] repudiated the contract, neither could recover").

Similarly, under the arbitration clause of the Second Supplemental Amendment, LPA, the city, and the BRA

shared responsibility for using arbitration to resolve the remaining differences that LPA claims prevented it from closing the transaction.[23] Neither LPA nor the city activated those procedures. LPA's complaint that the city and the BRA breached the contract by failing to determine the exact size and composition of the Hayward Parcel is undermined by LPA's failure to initiate arbitration about the undecided details or even to propose to the city that the procedures specified in the Tripartite Agreement should be used to resolve these differences. Similarly, questions about the treatment of Avenue de Lafayette and the allocation and value of air rights over it and other streets could have been answered in arbitration, but neither LPA nor Campeau ever sought such answers.

LPA's claims must thus rest on the possibility that even if its tender — particularly the December 19, 1988, letter from Campeau to Mayor Flynn — was insufficient, LPA (and Campeau) should be excused from its obligation to tender because the city's tactics and delays demonstrated that it would not perform under the contract. See *Leigh* v. *Rule*, *supra* at 668 ("the law does not require a party to tender performance if the other party has shown that he cannot or will not perform"). LPA claims, and the trial judge in denying the city's motion for directed verdict or judgment notwithstanding the verdict cites the fact, that the city failed to secure needed appraisals with which to determine the price for the Hayward Parcel,[24] that the BRA had proposed

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[23] LPA only brought suit in 1992, long after such recourse to arbitration to fix obligations would have been pointless, and so the city is entitled simply to claim that it had never been put in breach.

[24] In the Tripartite Agreement, the city was obligated to obtain appraisals of the 1978 value of parcels D-3 and D-4. Although it secured an appraisal for parcel D-3, it did not for D-4. The city argues, however,

zoning regulations that placed unacceptable height restrictions on the parcel, that the city's transportation department was threatening to route a street through the parcel, and that LPA, Campeau, the city, and the BRA had failed to reach agreement as to how to treat the Avenue de Lafayette. These facts, taken alone or together, do not excuse the obligation to tender. There was testimony from Marco Ottieri, LPA's project manager, that throughout the mid-1980's, LPA was committed to purchasing the Hayward Parcel regardless of its ultimate configuration and of restrictions placed upon the parcel by the city, because it would "build whatever we could build there profitably." He stated that LPA would have bought the parcel regardless of height restrictions and whether or not the city kept open Avenue de Lafayette. This seriously weakens LPA's argument that the city's proposed regulation of the Hayward Parcel materially affected the transaction or amounted to a repudiation.

Unlike a situation in which a defendant clearly expresses an unwillingness to perform, thereby repudiating the contract,[25] here LPA seeks to attribute repudiation to the city based on the mere fact that uncertainties remained that LPA shared responsibility for resolving. Compare *Hastings Assocs.* v. *Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 177 (1997) (where defendant indicated that it would not fulfil its obligations, defendant was in default and plaintiff was not obliged to use specified procedures to determine value of

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that the appraisals for D1, D-2, and D-3 sufficed to determine the value of D-4, which was a very small part of the over-all parcel.

[25] Compare *Kanavos* V. *Hancock Bank & Trust Co.*, 395 Mass. 199, 201-202 (1985) (bank repudiated Option contract to sell shares of stock by selling shares to a third party); *Limpus* v. *Armstrong*, 3 Mass. App. Ct. 19, 22 (1975) (defendants repudiated purchase and sale contract by selling property to third party).

business). In this circumstance, where a complex contract leaves certain key terms to be decided by formulae and procedures, and where both parties share responsibility for activating those procedures, the plaintiff cannot be ready, able, and willing to tender, nor can the plaintiff put the defendant in default, unless the plaintiff attempts to use the contractually specified mechanisms to overcome the very uncertainties they were designed for. If two parties form an agreement that incorporates procedural devices to overcome unknowns, a plaintiff must at least attempt to make use of those devices before he can claim that the unknowns prevented meeting his obligations at law. This is particularly true in a complex and heavily regulated transaction such as this one, where public entities and public and elected officials with changing policies and constituencies are involved, and the transaction spans many years. This is not to say that governments are absolved from performing contractual obligations, but where a government contract specifies procedures and methods a private party must be particularly assiduous to comply with them. "Men must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R.* v. *United States,* 254 U.S. 141, 143 (1920) (Holmes, J.). LPA knew at the time it entered into the contract with the city that political bodies have various obligations and constraints, and that closing the sale after exercising its option would require agreeing on the transaction's specifics. We therefore conclude as a matter of law that LPA was not excused from its obligation to put the city in default, and that LPA did not fulfil this obligation.

C

LPA alleges not only that the city breached the Tripartite Agreement but that it did so in bad faith. This allegation of

bad faith does not change our analysis in the preceding subsection.

The last clause of the Third Supplemental Agreement states that the January 1, 1989, drop dead date shall not apply if "the City and/or the [BRA] shall fail to work in good faith with the Developer through the design review process to conclude a closing." The Third Supplemental Agreement, however, was not signed until October 29, 1987, immediately prior to LPA's transfer of its rights to Campeau.[26] There is overwhelming evidence that the review process progressed appropriately as soon as Campeau initiated the process in the spring of 1988,[27] only months prior to the drop dead date.[28]

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[26] Campeau's actions in this regard must be attributed to LPA, for if they are not then the city's alternate argument that LPA abandoned the contract when it transferred its rights to Campeau would take on considerable force. LPA can- not have it both ways.

[27] Although LPA complains that the BRA's handling of the design review process prior to October, 1987, when the Third Supplemental Agreement was signed, violated the implied covenant of good faith, we reject this claim on two grounds. First, when the parties amended their agreement in 1987 and included a good faith clause, the slate was wiped clean for these purposes. Second, LPA failed to show that any delay in the design review process prior to 1988 was attributable to bad faith on the part of the city or the BRA rather than a lack of preparedness or persistence on LPA's part. LPA was engaged in discussions and negotiations with the BRA during 1984, 1985, and 1986, and may have completed the first phase of the BRA's four-stage authorization process by submitting an initial sketch of its plans for the Hayward Parcel, but LPA concedes that it did not progress beyond that very preliminary point. LPA did not press forward with its design, and it therefore cannot complain that its design was never approved.

[28] On April 25, 1988, Campeau's senior vice-president, Lenard McQuarrie, sent the BRA's director a letter indicating that Campeau had "begun to marshal" resources for the project and was about to "initiate" the review process. On May 16, 1988, McQuarrie stated that Campeau

Campeau's letters to the BRA during 1988 consistently demonstrate that the design review process was proceeding smoothly and in a collaborative fashion.[29] Thus, LPA cannot argue that the BRA or the city acted in bad faith with regard to the design review process during this period.[30]

Had bad faith infected the design review process itself, the drop dead date would have been extended automatically according to the terms of the Third Supplemental Agreement. As the review process was not so infected, LPA' S bad faith claim rests on the fact that the BRA refused to extend the drop dead date despite Campeau' s repeated requests for such an extension. A duty of good faith and fair dealing is implicit in the performance of a party's contractual obligations, see *Fortune* v. *National Cash Register Co.*, 373 Mass. 96, 102-103 (1977), and generally if parties modify an existing contract, their modification must be made in good faith: one

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was "beginning to commit significant funds to preliminary design . . . for the Hayward Place site."

[29] A June 17, 1988, letter from McQuarrie to the BRA stated that "(b]ased on the cooperation we are receiving from both yourself and your staff, we are optimistic that the project will proceed quickly through the. . . Development Review process. Similarly, an October 21, 1988, letter stated that "[w]e are making excellent progress on the . . . master planning of Boston Crossing and have begun the . . . review process." And on December 19, 1988, Campeau's letter to Mayor Flynn stated that all parties were "making good progress towards the final approval of this project."

[30] Moreover, even if the city *did* act in bad faith in the design review process and thus the option period was extended beyond January 1, 1989, neither Campeau nor LPA ever attempted to enforce the agreement by seeking arbitration, tendering payment, or seeking a closing after that date. As noted above, Campeau received design authorization in June, 1989, but went bankrupt in 1990. LPA did not then renew its negotiations with the city, but instead filed suit against Campeau in July, 1990, and against the city and the BRA in March, 1992.

party cannot extract the modification from the other wrongfully. See U.C.C. § 2-209, comment 2 (1989). But LPA cites no authority for the proposition that the refusal by one party to accede to a modification that would inure to the benefit of the other party is, in itself, bad faith, where the only ill motive alleged is a desire to avoid the benefit in question. Absent bad faith in the design review process, the city and the BRA were under no contractual obligation to grant an extension to LPA. Even if the defendants' refusal to extend the deadline was motivated by the possibility of evading the pricing formula in the Tripartite Agreement, as LPA suggests,[31] that refusal could not constitute bad faith, because the BRA had no contractual duty to grant the extension that LPA sought. Compare *Anthony's Pier Four, Inc.* v. *HBC Assocs.*, 411 Mass. 451, 472 (1991) (finding of bad faith justified where contract required defendant to approve a development plan and defendant refused to do so in order to extract monetary concessions from plaintiff). See Restatement of Contracts § 205 comment a (1979).

Finally, the mere fact that the city did not convey the Hayward Parcel to Campeau prior to January 1, 1989, does not support a claim of bad faith. Particularly given the uncertainties that LPA added to the transaction — including

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[31] LPA presented evidence that during the period in which LPA sought authorization of the sale to Campeau, the city's real property board publicly expressed concern that the pricing formula in the Tripartite Agreement was unfavorable to the city. On December 30, 1987, Commissioner J. Edward Roche of the city's real property department wrote Mayor Flynn expressing concern that a transfer of rights from LPA to Campeau might bring about a "windfall" to Campeau because of the pricing formula in Section 6.02. LPA also showed that the minutes of a meeting of the real property board on January 22, 1988, stated that "the Board expressed its desire . . . to receive the fair market value for the Hayward Parcel (abandoning the Tripartite formula)."

the substitution of Campeau for LPA and Campeau's including in its design proposals submitted for review designs for a much larger project, the Boston Crossing project, than LPA's original project that referred only to the Hayward Parcel — LPA cannot maintain that the city acted in bad faith by not completing the transaction, unless LPA and Campeau had also done all they could to force the city to close the sale. Had LPA, or Campeau, been serious about putting the city in default, it could either have indicated more clearly that it was ready, able, and willing to close the sale by indicating its understanding of the exact composition of and price to be paid for the Hayward Parcel and setting a time and place for a transfer of the deed, thereby forcing the city to make use of the appraisal and arbitration procedures, or itself pressed the appraisal and arbitration procedures specified in the Tripartite Agreement to resolve all remaining disagreements. That it did none of these things bars its claim against the city.[32] Neither party tendered performance, and neither was in breach or default. See *Flynn* v. *Wallace,* 359 Mass. 711, 716 (1971); *Hapgood V. Shaw,* 105 Mass. 276, 279 (1870). See also Corbin, Contracts § 663 (1960); § 1258 (1962).

III

We turn now to LPA's claims against the BRA. The Superior Court jury found that the BRA tortiously and intentionally interfered with LPA's contractual relations with

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[32] The jury returned a special verdict that affirmed that "L.P.A. perform[ed] its obligations under the contract." This verdict was incorrect as a matter of law, given the fact that LPA fulfilled none of the obligations set out above.

Campeau. The judge granted the BRA's motion for judgment notwithstanding the jury's verdict. The judge ruled that the Massachusetts Tort Claims Act (Act), G. L. c. 258, § 10 *(c)*, renders the BRA, as a "public employer," immune from suit for "any claim arising out of an intentional tort, including . . . interference with contractual relations." LPA argues that the BRA was not entitled to this ruling because it had raised the bar of the statute in an untimely fashion; because the BRA was an "independent body politic and corporate" and as such explicitly excluded by G. L. c. 258, § I, from the immunity accorded by § 10 *(c)*; and because, even if § 10 (c) did apply to the BRA, this would only remit the BRA to its situation before the enactment of c. 258, at which time the BRA was amenable to suit for intentional torts.

A

Although the BRA did not raise the bar of the statute in a motion to dismiss or at summary judgment, it did do so in its motion for a directed verdict at the close of all the evidence. The BRA renewed this argument in a motion for judgment notwithstanding the verdict. The judge ruled that this was sufficient, and that there had been a "flurry of arguments from both sides" on the issue. The only relevant authorities LPA cites for the proposition that the BRA raised this issue too late have to do with refusals to grant leave to amend pleadings because of prejudice to the nonmoving party. See *Mathis* v. *Massachusetts Elec. Co.*, 409 Mass. 256, 264 (1991); *Hamed* v. *Fadili*, 408 Mass. 100, 105 (1990). These authorities recognize that this sort of matter is committed to the discretion of the judge. Assuming that this should be treated as a motion to amend the pleadings, we conclude that the judge did not abuse his discretion. This is particularly so

because the status of the BRA for purposes of § 10 *(c)* is a purely legal question not requiring recourse to the jury.

B

In *Whitney* v. *Worcester,* 373 Mass. 208, 212 (1977), and *Mo- rash & Sons* V. *Commonwealth,* 363 Mass. 612 (1973), we warned that, if the Legislature did not act to abrogate the immunity from liability in tort accorded at common law to governmental entities, this court would do so. The Massachusetts Tort Claims Act followed in 1978, providing a scheme of tort liability for "public employers" in certain circumstances and subject to several conditions. See generally Glannon, Governmental Tort Liability under the Massachusetts Tort Claims Act of 1978, 66 Mass. L. Rev. 7, 10 (1981). Section 10 *(c)* excludes liability for intentional torts from the scope of c. 258 and specifically mentions the tort of interference with contractual relations. See G. L. c. 258, § 10 *(c).* Section 1 defines a public employer as

> "the commonwealth and any county, city, town, educational collaborative, or district, including any public health district or joint district or regional health district or regional health board established pursuant to the provisions of section twenty-seven A or twenty-seven B of chapter one hundred and eleven, and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof. . . which exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority, the Massachusetts Turnpike Authority, or any other independent body

> politic and corporate. With respect to public employees of a school committee of a city or town, the public employer for the purposes of this chapter shall be deemed to be said respective city or town.

The Superior Court judge ruled that the BRA was not an "independent body politic and corporate." Neither the statute itself nor our prior decisions allow a ready answer to the controversy the parties raise about this classification. Certainly the term is not self-defining. The leading case on? this matter, the learned opinion of the Appeals Court in *Kargman* v. *Boston Water & Sewer Comm'n*, 18 Mass. App. Ct. 51(1984), see *Commesso* v. *Hingham Hous. Auth.*, 399 Mass. 805, 808 (1987), traces the history of the term "body corporate and politic" from its original appearance in the Preamble to our Constitution to its present usage to designate "a legal entity [created by the Legislature] to perform specified tasks deemed to be essential public functions." *Kargman, supra* at 55. It is only the subset of *independent* bodies corporate and politic that do not enjoy immunity from intentional torts under § 10 *(c)*. What entities, in addition to the three specifically mentioned in § 1, are to be identified as independent bodies corporate and politic we have been left to discern from a rather inadequate set of hints. The term itself is not very helpful, so that the Appeals Court in *Kargman* sought to extrapolate from the list of authorities specifically designated as independent in § 1 to instances not specifically named. It identified two general features of the designated entities: financial independence and political independence. The court went on to identify certain indicia of financial and political independence, *id.* at 56-58, and concluded that the Boston water and sewer commission was such an independent body. By defining the term independence in terms of financial and political

independence, the *Kargman* analysis at least has the virtue of disaggregating the term into two possibly more manageable units, but the norm is still defined by reference to itself, and that is a problem.

The Superior Court judge, in a thorough and closely reasoned memorandum, applied the *Kargman* analysis to the situation of the BRA. He reached his conclusion that the BRA is not an independent body politic by emphasizing the factors that detract from the BRA's political independence: when initiating urban renewal projects it is subject to stringent public notice requirements and requires approval for many of its actions at the State and local level. He also found lacking indicia of financial independence, in that the BRA must account for its expenditures at the State and the local level and may receive State financial assistance for its urban renewal projects and advances to cover certain of its expenses. He concluded that "the BRA is subject to many checks on its power to initiate and carry out redevelopment projects in Boston, which do not comport with political and financial independence. It is significantly less autonomous than either the MBTA, Turnpike, or Massport." LPA points out the many ways in which the BRA has financial and political independence similar to that of the three authorities named in § 1: removal of authority members only for cause; its ability to sue and be sued in its own name; its ability to hold title to property in its own name; its enjoyment of the power of eminent domain; its ability to incur indebtedness and issue bonds without pledging the credit of the State or city; and its ability to charge market rents for its properties. LPA also compares the BRA to the Boston water and sewer commission, which was held to be independent in *Kargman*. Moreover, LPA points out that some of the features urged by the BRA as indicia of a lack of independence, such as the oversight by the State auditor of its expenditures which the judge mentions, apply to the three named authorities as well.

This battle of factors seems much closer to a standoff than either the BRA's or the judge's analysis would acknowledge.

Any analysis that relies heavily on the *Kargman* factors must cope with the embarrassment that just the factors that are discerned in *Kargman* as the indicia of independence of the three named entities are present with at least as much force in the case of Boston, other cities and towns, and the Commonwealth itself — all of which are designated at the beginning of § 1 as public employers. The BRA suggests that perhaps recourse to a possible underlying rationale for the designation of the three named entities might assist analysis: they all provide services for a fee not to the general public but to that specific segment of the public that chooses to use those services, and so it is fair that the users bear the cost in higher fees of the injuries intentionally inflicted by the authorities. This is only mildly convincing. We do not see why the costs of injuries inflicted by non-independent bodies should be borne by the injured parties alone and not by the public in general.[33]

Though we do not decline the illumination that these proposals and analyses might offer, we probably cannot do much better in this case than to rely on analogy, that logically imperfect but inveterate tool of the law in tight corners. See generally Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harv. L. Rev. 925 (1996); Levi, An Introduction to Legal Reasoning (1949). And here the closest analogy to the BRA are the local housing authorities, to which in *Commesso* we declined to as- sign independent status for the purposes of §§ 1 and 10 *(c)*. See *Commesso, supra* at 809. As the Superior Court judge noted, it is significant that

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[33] In *Kargman* v. *Boston Water & Sewer Comm'n*, 18 Mass. App. Ct. 51, 56 n.5 (1984), the Appeals Court cast doubt on this criterion.

redevelopment authorities were created by the Legislature to assume the powers, such as land assembly and the carrying out of redevelopment projects, formerly held by housing authorities. See St. 1952, c. 617, § 4, amending G. L. c. 121, § 26QQ. In communities that choose not to establish redevelopment authorities, the powers assigned to redevelopment authorities remain with the housing authorities. See G. L. c. 121B, § 9. If a community chooses to establish a redevelopment authority, the governance of that authority is the same as that which applies to a housing authority, G. L. c. 121B, §§ 5-7. And, as the Superior Court judge pointed out,

> "As operating agencies, housing and redevelopment authorities enjoy the same powers, including but not limited to the power to: sue and be sued; work with the federal government on urban renewal projects; receive public or private loans and grants; take property by eminent domain; clear and improve property; enter into contracts necessary to carry out housing and urban renewal projects; make relocation payments to displaced businesses or persons; borrow money upon the security of their bonds or notes; invest in securities; contract with organizations undertaking c. 121A projects; make and amend rules and regulations; and join with other operating agencies in exercising their respective powers. G. L. c. 121B, § 11."

Indeed, the two-page chart provided by LPA as an appendix to its brief here comparing the political and financial situation of various types of entities in the Commonwealth shows only

one nontrivial difference[34] between the BRA and a housing authority: the existence of statutory limits on the rent that housing authorities may charge tenants, see 0. L. c. 121 B, § 32, and the absence of such constraints on sales and leases of property by a redevelopment authority under G. L. c. 121B, § 49. But of course this difference is merely the result of the assignment of functions to a redevelopment authority in communities that choose to establish one. If redevelopment functions remain in the housing authority, which then plays a dual role pursuant to G. L. c. 121B, § 9 *(b)* or *(c)*, then the housing authority too, in respect to those functions, may charge market rents.[35] And it would be captious to suggest that a housing authority does or does not enjoy the immunities of the Act depending on whether redevelopment functions have been left with it.

The BRA is unique among redevelopment authorities and enjoys a special statutory basis. See generally Aronson, The Boston Redevelopment Authority: A Quasi Public Authority, 43 B.U. L. Rev. 466 (1963). The most significant difference between the BRA and other redevelopment authorities is that the BRA functions as the city's planning board and enjoys the powers of the State housing board in respect to c. 121A urban renewal projects.[36] See St. 1960, c. 652. See also *Opinion of the*

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[34] LPA also notes that the BRA does not need planning board approval for projects, whereas a housing authority does. This is because the BRA has had transferred to it the functions of the city's planning board in respect to its projects.

[35] General Laws c. 121B, § 9, states that housing authorities with redevelopment authority have the powers granted regular redevelopment authorities under (1. L. 121B, § 49.

[36] General Laws c. 121A, § 4, permits the housing board to make rules and regulations regarding the approval of redevelopment projects. The housing board must approve most redevelopment projects, G. L. c. 121 A, § 5, and must inspect the construction of redevelopment

Justices, 341 Mass. 760, 787-788 (1960). But both a city planning board and the State housing board would certainly be within the § 1 definition of public employers for the purposes of G. L. c. 258, § 10, and the addition of their powers should not make the designation of the BRA as a public employer less apt.

Finally, we resolve whatever indeterminacy this analysis may leave in favor of subjecting the BRA to the general regime of c. 258. The BRA is certainly a public body, a governmental entity of some sort performing public functions. Any doubts about the BRA's status under the difficult and uncertain designation of "independent body politic and corporate" should be resolved against such a designation, because of the desirability of making the c. 258 regime as comprehensive as possible, thus avoiding reintroducing the "crazy quilt" of immunities, *Rogers* v. *Metropolitan Dist. Comm'n*, 18 Mass. App. Ct. 337, 338-339 (1984), which the Act was meant to replace. This is particularly so because any decision taking a governmental entity out of the category of "public employers" has the effect not only, as here, of making that entity liable for intentional torts, but also of removing the immunities provided by the other provisions of § 10. This may have large consequences to which none of our cases so far has attended. Of particular concern is removing a governmental body from the protection of the immunity of § 10 *(b)*, which refers to

> "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office

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projects to ensure that construction complies with the approved proposal. G. L. c. 121A, § 8.

> or employment, whether or not the discretion involved is abused."

We conclude that the BRA is a public employer not excluded from the scope of the Act,

C

We have less difficulty disposing of LPA's ingenious argument that, even if the BRA is not an independent body politic and corporate, § 10 *(c)* does not confer upon it immunity from liability for intentional torts. Section 10 of c. 258 provides that "[t]he provisions of sections one to eight, inclusive, shall not apply to" any of the claims listed in that section. G. L. c. 258, § 10. The list includes, among other things, claims based "on the exercise or performance or the failure to exercise or perform a discretionary function," § 10 *(b);* and claims arising out of intentional torts, § 10 *(c).* Other excluded claims relate to assessment or collection of taxes, § 10 (d); issuance, denial or revocation of permits or licenses, § 10 *(e);* inadequate or negligent inspections, § 10 (1); failure to provide fire protection or police services, § 10 *(g)-(h);* and negligent provision of medical services, § 10 (1) (2). Section 2 provides for liability of public employers for negligence, G. L. c. 258, § 2, and §§ 4-7, impose certain prerequisites for claims against public employers, including the prior presentation of such claims for administrative action, and provide for procedures for their resolution. G. L. c. 258, §§ 4-7. LPA argues that because § 10 provides that none of these provisions shall apply to intentional torts, the result is that such claims are simply remitted to the preexisting law governing liability. And because the BRA's enabling statute, G. L. c. 121B, § 13, which preexisted C. 258, provided that the BRA shall be "liable . . . in tort in the same manner as a

private corporation," the BRA continues to be liable for the intentional tort charged here. LPA finds confirmation for this conclusion in our decision in *Spring* v. *Geriatric Auth. of Holyoke,* 394 Mass. 274 (1985), in which we stated that "[b]y excluding intentional torts from the scope of G. L. c. 258, the Legislature left open the matter of governmental liability for intentional torts. Consistent with the common law principles of governmental immunity which preceded the Massachusetts Tort Claims Act, we conclude that public employers retain their immunity from suits arising from intentional torts." *Id.* at 284-285. Because the preexisting law, to which we are remitted according to LPA's argument, allowed for BRA's liability for intentional torts, the BRA does not enjoy immunity for intentional torts now.

LPA's reading of the statute is not in accord with its over-all purpose of enacting a comprehensive and uniform regime of tort liability for public employers in the wake of our decisions in *Whitney* v. *Worcester,* 373 Mass. 208, 212 (1977), and *Mo- rash & Sons* v. *Commonwealth,* 363 Mass. 612 (1973). Although we have not undertaken a review of such legislation, it is likely that the enabling statutes of many public bodies contain a variety of provisions relating to the tort liability of those bodies. It would be the upshot of LPA's argument that, whenever any of the provisions of § 10 (including, for instance, those excluding liability for discretionary functions or for failure to grant or renew a license or permit) applied, we would be remitted to the preexisting law. It is sufficient to mention that the preexisting law to which LPA refers, G. L. c. 121B, § 13, applies to the Boston Housing Authority (BHA) as well, so that the BHA on this argument would be liable for the whole range of claims

excluded by § 10.[37] Compare *Commesso* v. *Hingham Hous. Auth., supra* at 809. Such a reading would be so manifestly against the intention of the Legislature to introduce a uniform regime of tort liability for public bodies, see *Rogers* v. *Metropolitan Dist. Comm'n, supra,* that a mere drafting infelicity will not lead us to adopt it. Similarly the statement quoted from our decision in *Spring* will not move us in that direction. In context it was quite irrelevant to the *Spring* case whether § 10 *(c)* was described as prescribing immunity for intentional torts or as remitting the matter to the preexisting common law, which in that instance would have foreclosed tort liability altogether. See *Spring, supra* at 295 (Abrams, J., concurring) (Federal Tort Claims Act, 28 U.S.C. § 2680[h] [1982], on which c. 258 is patterned, provides an interpretive guide and has been construed "as immunizing public employers from suits arising out of intentional torts"). We therefore hold that the BRA is immune under G. L. c. 258, § 10 *(c)*, from suit for intentional torts.

IV

LPA also claims that the motion judge erred in entering summary judgment against LPA on its G. L. c. 93A claims against the city and the BRA. Chapter 93A proscribes "unfair or deceptive practices in the conduct of any trade or commerce." G. L. c. 93A, § 2 *(a)*. A party engages in trade or

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[37] LPA seeks support for its argument in a 1983 amendment of G. L. c. 121B, § 13, that altered the treatment of the liability of employees of redevelopment and housing authorities. This is unpersuasive. The Legislature did not address itself directly to the operative first sentence of § 13, and we will not assume that an amendment of an independent portion of the section endorsed or reaffirmed that first sentence in the face of the strong Legislative mandate of c. 258.

commerce when it acts in a "business context." "This court . . . has repeatedly held that c. 93A does not apply to parties motivated by 'legislative mandate, not business or personal reasons.' " *Peabody N.E., Inc.* v. *Marshfield* 426 Mass. 436, 439-440 (1998), quoting *Poznik* v. *Medical Professional Ins. Ass'n*, 417 Mass. 48, 52 (1994). The gravamen of LPA's claim against the city and the BRA is that it was cheated out of the benefit that would have accrued to it if the agreement regarding the Hayward Parcel had been performed. This is indeed the kind of claim that is often made under c. 93A, see e.g., *Anthony's Pier Four; Inc.* v. *HBC Assocs.*, 411 Mass. 451, 475 (1991), but that does not mean that the city was engaged in trade or commerce when it entered into the arrangement nor when it took the actions of which LPA now complains. It is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislatively mandated ends. The allowance of the motion of summary judgment was correct because the defendants' involvement in these transactions was wholly in pursuit of the legislatively prescribed mandate of G. L. c. 121A, § 2, that "the redevelopment of land not only in sub-standard areas but also in blighted open and decadent areas in accordance with a comprehensive plan to promote the sound growth of the community is necessary." There simply cannot be any doubt that the parties' dealings took place in the context of the pursuit of the urban renewal and redevelopment goals of c. 121A and c. 121B. That is the premise of every other part of this litigation. Although we have not yet addressed the question whether a public entity is ever a proper defendant

in a c. 93A action, it is quite clear that in this case at least these public entities are not.[38]

V

Because we conclude as a matter of law that the city did not breach its contract with LPA, we reverse the judgment of the Superior Court and order entry of judgment for the city. Whatever contractual claims LPA may have against the BRA must fail for the same reason. The judgment in favor of the BRA is affirmed because we agree that it is immune from suit for an intentional tort. The judgment in favor of the city and the BRA dismissing LPA's c. 93A is also affirmed.

So ordered.

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[38] Cases such as *Boston v. Aetna Life Ins. Co.*, 399 Mass. 569, 575 (1987), in which the public entity may act as a plaintiff in a c. 93A action, are not apposite. One who deals with a public entity, as for instance in providing it with goods or services, may very well be engaged in trade or commerce without the entity being so engaged as well.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 92-1664-A

LAFAYETTE PLACE ASSOCIATES,
Plaintiff

v.

BOSTON REDEVELOPMENT AUTHORITY, et al.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO AMEND JUDGMENT

The plaintiff, Lafayette Place Associates, "LPA", has moved this court to amend the judgment against the City of Boston by establishing Jan. 1, 1989 as the breach of contract date in order that prejudgment interest be computed as of that date pursuant to G.L. c. 231, §6C. For the foregoing reasons, the Motion is denied.

This civil action was tried before a jury which found that the City of Boston had entered into a valid contract with LPA, that LPA performed its obligations under the

contract, that the City of Boston breached the contract, and that LPA's damages as a result of the breach amounted to $9,600,000. The verdict was recorded on a special verdict slip containing nine questions. The jury verdict came after a protracted, vigorously contested trial involving complex issues, occasionally perplexing testimony and a mass of elaborate documentary evidence.

There was no request that the court instruct the jury to determine a breach of contract date or dates; there was no request for any instruction as to that facet of the case. The court neither instructed on the issue nor was the jury asked to find a date or dates of the breach of contract by a special question on the verdict slip. Nor was the jury asked by special question to designate the conduct or action of Boston which constituted the breach of contract.

The plaintiff did not object either to the lack of jury instructions on determining the date of any breach of contract, or to the lack of any question on the special verdict slip establishing a date of breach. After the jury

found a breach of contract and damages of $9,600,000, judgment entered with interest accruing from the date of commencement of the action, March 16, 1992. (The original judgment appeared to read: May 16, 1992; this has been corrected by an agreed motion such that it now reads: May 16, 1992).

Although the jury did not find any date of breach of the contract, the plaintiff's motion to amend judgment requests that the court set the date of the breach at January 1, 1989, which was the date for closing on the Hayward parcel according to the Tripartite Agreement as amended by the "Third Supplemental Agreement and Amendment".

DISCUSSION

Prejudgment interest in contract actions is determined by G.L. 231, §6C.

> In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at the contract rate, if established, or at the rate of twelve per cent per annum from the date of the breach or demand. If the date of the breach or demand is not

> established, interest shall be added by the clerk of the court, at such contractual rate, or at the rate of twelve percent per annum from the date of the commencement of the action . . ."

The absence of a finding as to the date of breach may have resulted from the plaintiff's tactical decision not to pursue that issue. Placing the additional burden on the jury to find a specific act by the City of Boston constituting the breach and/or a specific date on which the breach occurred, may have been sufficiently onerous so as to jeopardize a jury finding that a breach had been proven.

Regardless of the reasons for not having the jury establish the date of the breach, this court is not free to evaluate the evidence and make a finding as to that date. Fixing the date of the alleged breach is a question for the trier of fact and, after a trial by jury, the trial judge can not make that determination. Karen Construction Co. v. Lizotte, 396 Mass. 143, 149 (1985); Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass 118, 125 (1986). A trial judge sitting without jury may determine the date of

demand or breach. Cesco Mfg. Corp. v. Norcross, Inc., 7 Mass. App. Ct. 837, 845 (1979). See Sterilite Corp. v. Continental Casualty Co., 397 Mass. 837, 841-842 (1986) (after summary judgment declaring a breach of duty to defend, a judge may establish the breach date). There were no stipulations about the date of the breach. Compare Bushkin Associates, Inc. v. Raytheon Co., 906 F.2d. 11 (1st Cir. 1990).

In summary, where the plaintiff never requested and the jury was never asked to establish the date of the breach, and where there was no finding as to the date of the breach, this court can not and will not make that determination. And, where the date of the breach is not established, prejudgment interest is to be calculated from the date of the commencement of the action. Starr v. Fordham, 420 Mass. 178, 195 (1995).

ORDER

The plaintiff's motion to amend is DENIED. Interest on the judgment will run from March 16, 1992.

/s/ Robert A. Mulligan
Justice of the Superior Court

DATED: August 20, 1997

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 92-1664A

LAFAYETTE PLACE ASSOCIATES,
Plaintiff

vs.

BOSTON REDEVELOPMENT AUTHORITY and
CITY OF BOSTON,
Defendants

SPECIAL JURY VERDICT
PURSUANT TO MASS. R. CIV. P. 49(a)

1. Was there a valid contract between the City of Boston and L.P.A. for the purchase and sale of the Hayward parcel?

   YES _X_ NO ___

   If yes, answer Q #2, if no, proceed no further but announce that you have reached a verdict.

2. Did L.P.A. perform its obligations under the contract?

YES X **NO** ___

If yes, proceed to Q #4, if no, proceed to Q #3.

3. If L.P.A. did not perform its obligation under the contract was its failure to perform caused solely by a material breach by the City of Boston or solely because the City of Boston and the BRA were dealing with L.P.A. in bad faith during the process?

Breach by City **YES**_____ **NO**_____

Bad faith by B.R.A. **YES**_____ **NO**_____

Bad faith by City **YES**_____ **NO**_____

If yes to any part of Q #3 proceed to Q #4, if no, proceed no further but announce that you have reached a verdict.

4. Did the City of Boston breach the contract?

YES X **NO** ___

if yes or no, proceed to Q #5.

5. Was the B.R.A. acting as the agent of the City of Boston regarding the purchase and sale of the Hayward parcel?

YES ___ NO X

If yes, proceed to Q #6. If no, follow instructions under Q #6.

6. Did the B.R.A. breach the contract?

YES X NO ___

If you answered Q #6 yes or Q #4 yes (i.e. found a breach by the City or B.R.A.) answer Q #7, otherwise announce you have reached a verdict.

7. What damages were proximately caused to L.P.A. by the breach, less any money received for the Hayward parcel from Campeau.

Nine Million Six Hundred Thousand
(WORDS)

$9,600,000.00
(FIGURES)

If answered Q #7, proceed to Q #8.

8. Did the B.R.A. intentionally interfere with the contractual relations between L.P.A. and Campeau?

YES X NO ___

If yes, answer Q #9, if no, proceed no further.

9. What damages resulted to L.P.A. from that interference (less the money received from Campeau).

Six Million Four Hundred Thousand
(WORDS)

$6,400,000.00
(FIGURES)

I hereby certify that the verdict is agreed to by ten of the twelve jurors.

Claudia Juarez
FORELADY

DATED: , 1998

APPENDIX E

TO: Mayor Raymond L. Flynn

FROM: Commissioner J. Edward Roche

DATE: December 30, 1987

RE: Sale of Lafayette Place Project

Lafayette Place Associates/Mondev wishes to sell its development (the retail shops and garage but not the hotel) to Campeau Corporation of Toronto. In order to sell said development, Lafayette (and Campeau) must obtain the approval of the Boston Redevelopment Authority and the Real Property Board.

If, without negotiation, the BRA and City allow the sale or transfer to occur, the new owner, Campeau (and also the prior owner) would realize an immediate monetary windfall due to the 'Option Agreement' in this Tripartite Agreement and the existing favorable lease Mondev has with the city executed in 1980/81 by the White Administration.

The Option Agreement concerns the Hayward Place parcel (currently a leased open air parking lot), which is separated from the development by the Avenue De Lafayette (a public way which may very will be discontinued and sold with the Hayward Parcel possibly under the same formula). If this parcel were appraised at say $25 Million, Campeau, under the present formula would have to pay the City only approximately $13 Million.

The Garage Lease calls for a yearly rental fee to the City of Boston/Real Property Department of $344,000.00 However, due to a favorable formula in this lease, the City has not received anything to date. There is a provision for "Deferred Basic Rental", a mechanism purportedly by which all monies owed, but not paid in the particular year it accrued, would be paid to the City sometime in the future. The City is owed approximately $2 Million in Deferred Basic Rental.

Query: Does this sum of money fall through the 'cracks' if the Garage Lease is assigned?

The Real Property Department has not been involved in the active negotiations with Lafayette and Campeau. If this is currently happening, it is the BRA which is doing it. I have been kept apprised of the negotiations as they go along.

APPENDIX F

BOARD MEETING: Friday, 22 January 1988

A meeting of the Real Property Board was duly held in Room 801, Boston City Hall, on Friday, 22 January 1988.

The following members were present:

J. Edward Roche, Chairman
Jon A. Chilingerian
Donald A. Walsh

Also present:

Mr. Joseph P. Kelly, Real Property Department
Mr. James E. Robbins, Real Property Department
Attorney Steven A. Whitkin, Real Property Department
Mr. James D. Parsons, TAMS

The meeting was called to order by the Chairman J. Edward Roche at 9:15 a.m., and the minutes of the 20 November 1987 Board Meeting were approved.

The Board Members were introduced to Mr. James d. Parsons who will be the new Project Manager from TAMS for the Citywide Strategic Parking Study. They expressed their displeasure with the latest timeline submitted by TAMS for completion of the Final Draft, the public/private briefing sessions, the Symposium and the Final Report. The Board then directed Mr. James Robbins to meet with

TAMS and to work out a new Timeline for the Study. The Chairman also impressed on Mr. Parsons the Board's need for competent project management in light of the recent project management changes at TAMS. The Board distributed to Mr. Parsons, for his review, a copy of their November 20, 1987 Board Minutes which contains Board comments on the TAMS Study up to that time.

The Executive Secretary announced the following tabulations of bids filed at the Office of the Board for leasing the off-street parking facility at Purchase and High Streets and Atlantic Avenue, under the Fitzgerald Expressway, Boston for a term of two (2) years beginning January 1, 1988. Said proposals were publicly opened and read aloud at the Office of Board with Mr. Joseph Kelly and Attorney Steven Whitkin at 10:00 a.m., on Tuesday, December 15, 1987:

Mr. Steven Whitkin updated the Board on the possible transfer of the retail and garage components of the Lafayette Place Development from Mondev to Campeau (the company which acquired Allied Stores, including Jordan Marsh).

The three issues directly involving this department are the approximate $2 million in deferred basic rental which has accrued over the past six years, the formula in the Tripartite Option Agreement to compute payment for the Hayward Parcel and the yearly garage rental of a minimum of $344,000.00.

The Board expressed its desire to capture the $2 million owed the City (but deferred until now); to receive the fair market value for the Hayward Parcel (abandoning the Tripartite formula), and to receive the basic rental of $344,000.00 without contingency allowing for deferment of same.

Attorney Whitkin apprised the Board members that both the Mayor's Office of Development and the Boston Redevelopment Authority had been apprised of their concerns and that these three issues were among those that were 'on the table' in the negotiations between the BRA, Mondev and Campeau.

In response to an advertisement for a Parking and Transportation Consultant to undertake a study to determine the feasibility and transportation impact of developing and underground garage on and about the present site of the Kingston/Bedford Garage, the following five (5) firms submitted proposals submitted to the Real Property Department prior to the 5:00 p.m., November 17, 1987 filing date:

URS Corporation
80 Boylston Street
Boston, MA 02116

TAMS
38 Chauncy Street
Boston, MA 02111

Vanasse Hangen Brustin, Inc.
60 Birmingham Parkway
Boston, MA 02135

LEA Group
75 Kneeland Street
Boston, MA 02111

RICH AND ASSOCIATES - MICHIGAN

Barnes and Jarnis, Inc.
216 Tremont Street
Boston, MA 02116

A proposal evaluation process was designed to select the best parking and transportation consultant for this important project.

The proposal evaluation committee consisted of five (5) individuals. Said committee reviewed each firm's proposal and presented its findings to the Commissioner of the Real Property Department and the Real Property Board.

As a result of this process Rich And Associates, Inc. was the recommendation of the Committee. Attorney Whitkin also distributed a letter detailing the scope of services, time schedule, and fee. He also recommended that the Board rescind its vote of 22 May 1987 regarding this topic as being inappropriate. After discussion, on motion duly made and seconded, it was unanimously

VOTED: To rescind the Real Property Board Vote taken on 22 May 1987 regarding the hiring of a consultant to perform a feasibility study of the Kingston-Bedford

development site as follows:

> That the Chairman is authorized to enter into an appropriate agreement with the Boston Redevelopment Authority for the services of a consultant to perform a feasibility study for an underground parking structure at the Kingston-Bedford development parcel in an amount not to exceed $30,000. The BRA will provide $15,000 for the study from Kingston-Bedford garage disposition proceeds and the Real Property Board will select and manage the consultant's work.

It was also unanimously

VOTED: To authorize the Chairman to enter into a contract with Rich and Associates, Inc., 25240 Lahser Road, Southfield, Michigan, to provide parking and transportation consulting services to undertake a study to determine the feasibility and transportation impact of developing an underground parking garage on the Kingston-Bedford and Essex-Lincoln sites, in an amount not to exceed $60,000 to be paid out of the Parking Facilities Fund. The Boston Redevelopment Authority will partially reimburse the Board for the cost of this study in an amount not less than $15,000.

The Executive Secretary noted that Attorney Steven A. Whitkin's contract would expire February 23, 1988. Under terms of a new contract Attorney Whitkin would provide development consultant services for Lafayette Place Phase II and the Kingston-Bedford/Parcel 18 parcel to parcel linkage project in addition to being involved with disposition and/or construction of

parking facilities in the neighborhoods and downtown.

After discussion, on motion duly made and seconded, it was unanimously

VOTED: To approve a contract with Steven A. Whitkin, 778 Tremont Street, Boston, Ma 02118 as Development Consultant to the Real Property Board for one year beginning February 24, 1988, at a salary not to exceed Forty Eight Thousand One Hundred ($48,100) Dollars, said salary to be paid out of the Parking Facilities Fund; and to authorize the Chairman to execute a contract for the Board in accordance with the terms discussed above.

There being no further business, on motion duly made and seconded, it was unanimously

VOTED: To adjourn at 10:20 a.m.

ATTEST

A TRUE COPY

Richard M. Carter
Executive Secretary
Real Property Board

APPENDIX G

CAMPEAU

CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

December 19, 1988

Honorable Raymond Flynn
Mayor of the City of Boston
One City Hall Plaza
Boston, MA 02201

Dear Mayor Flynn:

Since our last meeting, the Presidential election has now taken place and although the result might have been a disappointment to you, I feel that the process of election of a president is so long that I am glad it is over. I feel that Mr. Dukakis put up a very good fight and certainly appeared sincere in his policies as to how he would discharge his responsibility as president.

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

CAMPEAU

CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

Our people have been seeking an extension to close on our purchase of land owned by the city, which is part of our downtown project. Mr. Coyle refused to extend the closing, but wanted to give some kind of letter which would, in fact, protect us on buying the land, but that change would expose us to perhaps paying a much higher price and could significantly affect our economics on the project.

My lawyers advised me today that we have no recourse but to officially notify the city that we wish to complete the transaction and make payment immediately.

I was somewhat surprised with that turn of event, because I was under the impression and I still am, that our people and your officials had been making good

ROBERT CAMPEAU

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PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

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CORPORATION

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progress towards the final approval of this project. I know that you want this project, because it would clean up what is presently an eyesore and it would further your plans to continue to redevelop the combat zone. The fact that we have committed to put a Bloomingdale's on the piece of land that we are buying from the city certainly demonstrates our belief that this will be a very good project in the long run and that we also believe that the city will continue to do everything it can to erase the combat zone by encouraging more redevelopment, of the area. Our project will go a long way towards helping that process.

I should underline, Mr. Mayor, that this project is not black or white, but that we have decided to take this risk and we hope that the final outcome will be in our

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favor, but I want you to appreciate that we know that we have a risk.

In order to expedite the zoning process this Spring, I agreed with your proposal and desire to further build more low cost housing in the Boston area, which I thought was very good, and we are committed to go ahead and help you with housing along the plans that I discussed with you this Spring or some other variation at your choice.

Mr. Mayor, I have great affection for the city of Boston - I told you that before. I feel you have done a great deal to preserve its heritage and since we have a big stake in the Boston area throughout the entire state. We are anxious to make our project a major success for the city of Boston. I am sure you can appreciate, Mr. Mayor, that by committing our effort at

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

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CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

the present time to this project and committing Bloomingdale's to it, it must come to a fruitful conclusion very soon because in the meantime, there are other opportunities which we are passing by.

I am wondering if Mr. Coyle has been influenced by the recent article that appeared in The Wall Street Journal, which was extremely unfair, and totally inaccurate.

I am enclosing herewith a copy of our 10-K and a copy of our 10-Q, which were approved by the Board of Directors on December 11. The numbers speak for themselves. We have completed the sale of our assets at the price that we set out to do and not as reported in the Journal. You will notice that the numbers reflect a much more substantial profit than last year, even thought we had flat sales and

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

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were feeling the effects of having gone through a major takeover.

We expect the company to perform well next year for two reasons: In 1988, sales were projected to increase by 5-6%, the reason the projections were not met was because of the takeover disruption and steamlining. By the middle of the summer, we were quite under water. Since September we have come up very fast and we hope to finish slightly ahead of flat sales by December. Also, our streamlining is now complete, and annual savings should exceed $300 million per year.

The Journal reported also that we had a $10 billion debt. Wrong again, the debt in Campeau Canada is approximately $1.5 billion, and the debt in Federated/Allied about $6 billion. I should point out,

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

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however, that the retail operations in the United States are on a stand alone basis. Campeau is a real estate development corporation which has done many large projects and we have just completed one of the most major office towers in Toronto, of 2.5 million square feet. I have extended an invitation to you to visit some of my projects and hope we will still have the opportunity to visit with you in Canada and the United States.

I want to confirm again to you, Mr. Mayor, that we are committed to this project. We hope that the zoning can be completed by mid 1989 to allow construction to start. I want to take this opportunity to wish you and your family a Merry Christmas and Happy New Year.

/sm
Attachments

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

APPENDIX H

December 30, 1988

Mr. Robert Campeau
Chairman and Chief Executive Officer
Campeau Corporation
320 Bay Street
Toronto, Ontario

Dear Mr. Campeau:

On behalf of the City and in response to your letter to Mayor Flynn, I would like to reconfirm our intent to work with your organization on the Boston Crossing project. The Campeau Corporation is to be commended for its development concept and for its retail plan for the area. As part of the Midtown Cultural District, the project will not only benefit from the district's economic potential, but could be an integral part of its renaissance.

Although the project is generally well conceived, several issues need to be worked out as part of the normal development review process. Of particular concern are the proposed height of the Hayward Place office tower and the size and massing of the Summer Street component.. Recent discussions with Len McQuarrie have been very helpful in our effort to resolve these concerns. I know you understand our desire for a project

that Boston and the Campeau Corporation can look to with pride.

Regarding your stated concern over the price of the Hayward Place parcel, once the development review process is complete, the City's parcel can be sold for its fair reuse value, determined through appraisal, using all relevant factors, including existing zoning as well as constraints on the overall development site as a guide. Such a sale is subject to the approvals of the Real Property Board, the City Council, and the Mayor.

By their own terms, prior agreements on Hayward Place will expire on January 1, 1989. This event does not in our judgment alter our willingness to work with you and your representatives to develop the Boston Crossing project. It simply puts the question of the disposition of Hayward Place in a current context.

It is anticipated that the development review process and Land Disposition Agreement negotiations can be completed in the coming year. With your continued cooperation, we believe we can work out the terms necessary for the Campeau Corporation to go forward with the Boston Crossing project.

The project is exciting and can be very beneficial for Boston and accordingly will

be given careful attention and assistance. Given the considerable work to date, it would be unfortunate for your project not to go forward. You have our commitment to work collaboratively on the Boston Crossing project and the Midtown Cultural District Plan.

Sincerely,

Stephen Coyle

cc: Mr. John P. Boorn
Mr. Lenard McQuarrie

APPENDIX I

TRIPARITE AGREEMENT

AMONG

CITY OF BOSTON

BOSTON REDEVELOPMENT AUTHORITY

AND

LAFAYETTE PLACE ASSOCIATES

dated
December 22, 1978

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TRIPARTITE AGREEMENT

AGREEMENT made as of this 22nd day of December, 1978 by and among the CITY OF BOSTON, a municipal corporation ("City"), acting by and through its Mayor and its Real Property Board, the BOSTON REDEVELOPMENT AUTHORITY, a public body politic and corporate organized under the laws of the Commonwealth of Massachusetts ("Authority"), and LAFAYETTE PLACE ASSOCIATES, a general partnership (the "Developer") whose partners are Mondev Mass., Inc., a Massachusetts corporation, and Sefrius Corp., a Delaware corporation.

W I T N E S S E T H:

WHEREAS, with the assistance of the federal, state and city governments, the Authority is carrying out the Bedford West Urban Renewal Project pursuant to the Bedford West Urban Renewal Plan approved by the Authority on February 8, 1973, by the Boston City Council on April 23, 1973, by the Mayor of Boston on April 30, 1973, by the Massachusetts Department of Community Affairs on May 23, 1973, as amended by proclaimer dated May 2, 1974, and recorded at Suffolk County Registry of Deeds, Book 8777, Page 650;

WHEREAS, the City, the Authority and Developer desire to carry out the

proposed development sometimes known as Lafayette Place;

WHEREAS, the aspects of the Project will be located in air rights within, above and contiguous to three parcels of land (Parcels A, B and C) and portions of certain streets to be discontinued, all of which parcels and streets are to be acquired by the City and are shown on the plan annexed hereto and marked Exhibit A;

WHEREAS, incident to the Project the City will enter into arrangements for the acquisition of five additional parcels of land and improvements thereon and the discontinuance and acquisition of streets adjacent thereto, which parcels are designated Parcels D-1, D-2, D-3, D-4 and E which parcels and streets are shown on Exhibit A;

WHEREAS, the Bedford West Urban Renewal Project is a part of the Project;

WHEREAS, the City and the Authority have entered into the Cooperation Agreement annexed hereto and marked Exhibit B and pursuant to which the City and the Authority have agreed to take certain actions in furtherance of the Bedford West Urban Renewal Project;

WHEREAS, certain public improvements are to be constructed by the City and the Authority incident to the Project;

WHEREAS, the City and the Authority have determined that the Project and the aforesaid public improvements are in the best interests of the City and the public good and welfare;

WHEREAS, the City, acting by and through its Real Property Board, has determined that the Parking Garage to be undertaken by its pursuant to this Agreement and its relationship to the Project is reasonable and in furtherance of Chapter 474 of the Acts of 1946, as amended, and special acts supplementing the power of the Real Property Board under said Chapter 474, as amended;

WHEREAS, the City, acting by and through its Real Property Board, has determined that said Parcels A, B, C, D-1, D-2, D-3 and D-4 and Parcel E (as shown on Exhibit A), are appropriate for parking facilities but that such portions of such Parcels as are not devoted to parking facilities and facilities in support thereof constitute surplus air-space unnecessary or inappropriate for parking facilities above, within or contiguous to the parking facilities to be constructed pursuant to this Agreement;

WHEREAS, the Developer intends to form a partnership under Chapter 121A of the General Laws and Chapter 652 of the Acts of 1960, as amended, and to undertake certain of the non-public portions of the Project in accordance therewith, thereby serving public uses by eliminating decadent and substandard areas, providing increased employment opportunities for the citizens of the City, stabilizing land values in the area, and assuring the City of needed revenue;

WHEREAS, the Developer and the City have determined that the benefit of the combined public and private development could not be achieved by private enterprise alone without the aid provided by Chapter 121A of the General Laws and Chapter 652 of the Acts of 1960, as amended;

WHEREAS, Alstores Realty Corporation has constructed and reconstructed certain buildings, all of which together comprise the department store operated under the name of Jordan Marsh and all of which are to be physically and operationally integrated with the Project;

WHEREAS, the Developer and the City have entered into this Agreement and other documents providing for such

integration of the Project and such department store; and

WHEREAS, the City, the Authority and Developer are entering into this Agreement in reliance upon the performance of their various obligations hereunder and the construction by each of them of certain improvements as a part of and incident to the Project.

NOW, THEREFORE, in consideration of the mutual promises herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

. . .

ARTICLE VI

PARCELS D-1, D-2, D-3 AND D-4; PARCEL E

. . .

Section 6.02. Right to Acquire Parcels D-1, D-2, D-3 and D-4. In the event that the City shall determine to discontinue the Hayward Place Garage, the Developer and its successors and affiliates (as defined in Section 9.03. j) hereof) are hereby given the sole and exclusive right and option on the terms

herein set forth to acquire the unencumbered title to the interest of the City (except that such title shall revert to the City one hundred (100) years and one (1) day from the date of recording of the deed thereof) in parcels D-1, D-2, D-3 and D-4 or, if a subsurface parking facility shall be constructed thereunder, in the air rights over parcels D-1, D-2, D-3 and D-4 and New Essex Street (but only between Harrison Avenue Extension and Washington Street as shown on Exhibit A) and such rights appurtenant thereto as are necessary to make the air rights commercially viable. No sale, transfer or other disposition of any such rights shall be made by the City until three (3) years from the date on which the City has finally determined in accordance with law that the Hayward Place Garage is to be discontinued in operation and has given notice to the Developer of such determination and of the extent, if any, to which the City has determined and agrees to create subsurface parking beyond that to which it is obligated hereunder. If within such period (the "Option Period") the Developer shall notify the City that it desires to purchase the rights hereby made available to it then the City shall sell the same (without air rights over New Essex Street, if the Developer shall so elect) to the Developer, its successors or its affiliates.

The City has obtained appraisals which it has determined are acceptable to it and which set forth the current fair market values of Parcels D-1 and D-2 and shall forthwith after the date of this Agreement obtain likewise acceptable appraisals for the current fair market values of Parcels D-3, D-4 and relevant interests in New Essex Street. Forthwith after the same are available, the City shall give copies of such appraisals to the Developer. The purchase price to be paid hereunder shall, if subsurface rights are not retained by the City, be the fair market values shown by such appraisals plus one-half (1/2) of the increase, if any, in such values as the result of construction of the Public Improvements and the Project. The purchase price to be paid hereunder shall, if subsurface rights are retained by the City, be one-half (1/2) of the fair market values shown by such appraisals plus one-half (1/2) of the increase, if any, in such values as the result of construction of the Public Improvements and the Project. The existence and amount of increase in fair market values attributable to the construction of the Public Improvements and the Project shall be determined by independent appraisal.

As aforesaid, the Developer may exercise the right and option set forth in this Section 6.02 by giving notice of its desire to purchase such rights to the City

at any time within the Option Period. After the receipt of and following such notice from the Developer, the parties shall in good faith negotiate and enter into an agreement calling for the purchase and sale of the rights in question. Such agreement shall be in the customary form of agreements for the purchase and sale of real estate in the greater Boston area except that the agreement shall reflect such reservation and shall contain other appropriate provisions with respect to the integration of construction and other matters relevant to coordinated use of the rights conveyed and the rights retained by the City. Any such purchase and sale agreement may provide for a closing date extending up to six (6) months after the end of the Option Period and the expiration of the Option Period in any event shall not affect the rights of the Developer to proceed with an acquisition if notice of the exercise of such rights has been given prior to the expiration thereof, provided that, the Developer shall lose its rights hereunder to proceed with an acquisition if, because of a failure of the Developer to work in good faith to conclude a purchase and sale agreement or to perform thereunder, a closing has not occurred within six (6) months after the end of the Option Period, unless the City and the Developer shall agree to a further extension. Notwithstanding the foregoing, in all cases the Developer's

rights hereunder shall extend for such period of time as may be necessary for the City to substantially complete construction of any subsurface parking facilities for which the City is or may become obligated hereunder.

Prior to the construction of any additional subsurface parking facilities on Parcels D-1, D-2, D-3 or D-4 and prior to disposition of such rights to the Developer, its successors or affiliates, the City may use the surface of the land for parking so long as the same is operated and maintained to the highest standards and in keeping with the character of the Project. A conveyance under this Section 6.02 to the City which results in a reduction in the number of parking spaces in the Project Area shall not render the City in default under this Agreement.

Section 6.03. Rights to Acquire Parcel E. The City agrees to demolish the garage known as the Lincoln-Essex Parking Garage and designated on Exhibit A. Such demolition shall commence no later than the date on which the Parking Garage shall be available for occupancy and demolition shall be expeditiously completed once started. Pursuant to understandings that the City has orally reached (and hereby agrees to exercise best efforts to confirm in writing) with Boston Edison Company, it is expected

that the City shall acquire from Boston Edison Company Parcel E and the air rights over the adjacent, existing substation in exchange for the unencumbered fee simple absolute interest in the parcel of real estate from which the Lincoln-Essex Parking Garage will have been cleared. Such exchange shall occur as soon as possible after the completion of demolition of the Lincoln-Essex Parking Garage.

The Developer and its successors and affiliates are hereby given the sole and exclusive right and option to acquire unencumbered fee simple absolute of the City in Parcel E and such air rights over said substation (less areas retained by the City for street purposes) for a period which begins on the date hereof and ends on the last to occur of five (5) years from the date on which the City shall satisfy its obligations to acquire title to Parcel E and such air rights over said substation or twelve (12) months from the date of issuance of all certificates of completion permitted under Section 4.06 hereof. However, if the City shall determine and agree to construct subsurface parking under Parcel E the acquisition right and option shall be limited to a right and option to purchase the air rights above Parcel E and such subsurface parking and over said substation and such rights appurtenant thereto as are necessary or

appropriate to make the air rights commercially viable.

The City shall within thirty (30) days after the date on which the City Council shall approve this Agreement cause an appraisal to be made of the fair market value of Parcel E (less any areas proposed to be retained for future street purposes) and such air rights over said substation as of such date. The purchase price to be paid hereunder shall, if subsurface rights are not retained by the City, be the fair market value shown by such appraisal plus one-half (1/2) of the increase, if any, in such value as the result of construction of the Public Improvements and the Project. The purchase price to be paid hereunder shall, if subsurface rights are retained by the City, be one-half (1/2) of the fair market value shown by such appraisal plus one-half (1/2) of the increase, if any, in such value as the result of construction of the Public Improvements and the Project. The existence and amount of increase in fair market value attributable to the construction of the Public Improvements and the Project shall be determined by independent appraisal.

The Developer's (or its successors' or affiliates') exercise of the right and option set forth in this Section 6.03 shall be undertaken with the benefit of all time

periods and in the same manner as it is entitled to exercise the right and option provided under Section 6.02, above. If under either of such Sections the City has determined and agreed to construct subsurface parking facilities then the City shall forthwith thereafter perform such construction in order that the acquisition rights of the Developer (or its successors or affiliates) hereunder may be availed of on a timely basis.

. . .

ARTICLE XIII

FAIR MARKET VALUE

Section 13.01. Fair Market Value. The term "Fair Market Value" as used in this Agreement means the price, as of the Notice Date, which a seller, willing but not obligated to sell, would accept for the Project Rights, and which a buyer, willing but not obligated to buy, would pay therefor in an arms' length transaction. Fair Market Value shall be determined in accordance with the following procedure.

Either party may give written notice to the other party and in such notice shall designate the first appraiser (the "First Appraiser"). Within fifteen (15) days after the service of such notice, the other party

shall give written notice to the party giving the first notice, which notice shall designate the second appraiser (the "Second Appraiser"). If the Second Appraiser is not so designated with or by the time above specified, then the party designating the First Appraiser may request appointment of the Second Appraiser by the Chief Judge of the United States District Court for the District of Massachusetts or any successor federal court of original jurisdiction but if such Chief Judge shall not act then appointment may be requested of the President of the Boston Bar Association. The First and Second Appraisers so designated or appointed shall appoint a third appraiser (the "Third Appraiser") and if they shall be unable to agree upon such appointment within ten (10) days after the time aforesaid, the Third Appraiser shall be selected by the parties themselves, if they can agree thereon within a further period of fifteen (15) days. If the parties do not so agree, then either party, on behalf of both, may request that such appointment be made by the Chief Judge of the United States District Court for the District of Massachusetts or any successor federal court of original jurisdiction. In the event of the failure, refusal or inability of any appraiser to act, a new appraiser shall be appointed in his stead, which appointment shall be made in the same manner as hereinbefore provided for the appointment

of such appraiser so failing, refusing or being unable to act. Each party shall pay the fees and expenses of the appraiser appointed by such party, or in whose stead, as above provided, such appraiser was appointed, and the fees and expenses of the Third Appraiser, and all other expenses, if any, shall be borne equally by both parties. Any appraiser designated to serve as above provided, shall be disinterested, and shall be familiar with property values in metropolitan Boston, Massachusetts. The appraisers shall determined the Fair Market Value of the Project Rights. A decision joined in by two of the three appraisers shall be the decision of all the appraisers. After reaching a decision, the appraisers shall give written notice thereof to the parties hereto which notice shall in reasonable detail state the Fair Market Value so determined and the factors considered by the appraisers in making such determination, and the Fair Market Value so stated shall be considered Fair Market Value for the purposes of this Agreement and shall be final and binding upon such parties. If the appraisers shall fail to reach a decision within ninety (90) days (or such further time as may reasonably be requested by either party and approved by the other) after the appointment of the third appraiser, either party may make application to any court of competent

jurisdiction for a determination by such court of Fair Market Value.

. . .

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals as of the day and year first above written.

APPROVED AS TO FORM:

\s\ illegible
Corporation Counsel
City of Boston

CITY OF BOSTON

By \s\ Kevin H. White
Kevin H. White
Mayor

APPROVED AS TO FORM:

\s\ illegible
General Counsel
Boston Redevelopment Authority

CITY OF BOSTON
By: Real Property Board

By \s\ Joanne A. Prevost
Joanne A. Prevost
Commissioner of Real
Property Board
Chairman of Real
Property Board

WITNESS:

\s\ illegible

BOSTON REDEVELOPMENT
AUTHORITY

By \s\ illegible
Director

WITNESS:

\s\ illegible

LAFAYETTE PLACE ASSOCIATES
By: Mondev Mass., Inc.
general partner

By \s\ illegible
Its Vice President

WITNESS:

\s\ illegible

By: Sefrius Corp.
general partner

By \s\ illegible
Its President

SECOND SUPPLEMENTAL AGREEMENT
AND AMENDMENT

This Agreement is made as of February 26, 1982, among the CITY OF BOSTON, a municipal corporation ("City"), acting by and through its Mayor and Real Property Board, the BOSTON REDEVELOPMENT AUTHORITY, a public body politic and corporate ("BRA") organized under the laws of the Commonwealth of Massachusetts, and LAFAYETTE PLACE ASSOCIATES, a Massachusetts limited partnership ("Developer"), of which the present general partner is Mondev, Mass. Inc., a Massachusetts corporation.

WITNESSETH:

WHEREAS, the parties hereto or their predecessors have entered into: i) an agreement dated as of December 22, 1978 ("Tripartite Agreement"), and ii) an agreement dated as of June 1, 1979 ("Supplemental Agreement") supplementing the Tripartite Agreement, and iii) an agreement dated October 12, 1979 ("Survival Agreement") relative to the Tripartite Agreement and the Supplemental Agreement. Such agreements are herein collectively referred to as the "Founding Documents" and concern a private and public development

("Lafayette Place") along Washington Street in Boston, Massachusetts, and

WHEREAS, implementation of Lafayette Place has proceeded generally as contemplated by the Founding Documents but with certain changes and modifications, so that the parties desire hereby to set forth further supplemental agreements concerning and amendments to the Founding Documents.

NOW, THEREFORE, in consideration of the mutual agreements herein contained and intending hereby to be legally bound, the parties hereto agree as follows:

. . .

10. Section 6.02. of the Tripartite Agreement is hereby amended in the following respects:

a) In the first paragraph of that Section the following words appearing at the beginning of that paragraph are hereby deleted:

> "In the event that the City shall determine to discontinue the Hayward Place Garage, . . .".

b) The second sentence of the first paragraph of that Section is

hereby deleted and in its place there is substituted the following:

"No sale, transfer or other disposition of any such rights shall be made by the City until three (3) years from the date on which the City has given notice to the Developer of the extent, if any, to which the City has determined and agrees to create subsurface parking beyond that which is to be created hereunder.

c) There is hereby added after the end of the first sentence of the second paragraph of that Section the following:

"Said appraisals were prepared by John E. O'Neill and are dated July 25, 1978 and May 9, 1979".

d) The following paragraphs are hereby added to the end of that Section:

"Notwithstanding anything else above contained, if the Developer shall exercise the right and option set forth in this Section 6.02, there shall automatically

be created an agreement by the Developer to buy and by the City to sell the aforesaid Parcels, except that, if a sale is not legally possible, the provisions of Section 15.05 hereof shall apply. Consistent therewith, the parties acknowledge that the references above to the execution of a purchase and sale agreement are intended only to indicate that appropriate details of the purchase and sale shall be worked out by the parties so as to conform to their intent under this Section 6.02., but if they shall be unable to do so then the matter shall be resolved by arbitration in accordance with the arbitration procedure set forth in ARTICLE EIGHT of the Deed and Agreement, dated as of September 11, 1979, between the City and the Developer and recorded with Suffolk Deeds at Book 9288, Page 90."

. . .

APPROVED AS TO FORM:

\s\ illegible
Corporation Counsel
City of Boston

CITY OF BOSTON

By \s\ Kevin H. White
Kevin H. White
Mayor

APPROVED AS TO FORM:

\s\ illegible
General Counsel
Boston Redevelopment Authority

CITY OF BOSTON
By: Real Property Board

By \s\ Bernard W. Callahan
Bernard W. Callahan
Commissioner of Real
Property Board
Chairman of Real
Property Board

WITNESS:

\s\ illegible

BOSTON REDEVELOPMENT
AUTHORITY

By \s\ Robert H. Ryan
Robert H. Ryan
Director

WITNESS:

\s\ illegible

LAFAYETTE PLACE ASSOCIATES
By: Mondev Mass., Inc.
general partner

By \s\ illegible
Its President

THIRD SUPPLEMENTAL AGREEMENT AND AMENDMENT

This Agreement is made as of 29th day of October, 1987, among the CITY OF BOSTON, a municipal corporation ("City"), acting by and through its Mayor and Real Property Board, the BOSTON REDEVELOPMENT AUTHORITY, a public body politic and corporate ("BRA") organized under the laws of the Commonwealth of Massachusetts, and LAFAYETTE PLACE ASSOCIATES, a Massachusetts limited partnership ("Developer"), of which the present general partner is Mondev, Mass., Inc., a Massachusetts corporation.

WITNESSETH:

WHEREAS, the parties hereto have entered into an agreement dated as of December 22, 1978, supplemented and amended by agreements dated as of June 1, 1979, October 12, 1979 and February 26, 1982 and relating to a private and public development ("Lafayette Place") along Washington Street in Boston, Massachusetts. Such agreement as supplemented and amended is herein referred to as the "Tripartite Agreement".

WHEREAS, in implementation of Phase 2 of Lafayette Place the parties desire hereby to set forth a further supplemental agreement concerning and amendment to the Tripartite Agreement.

NOW, THEREFORE, in consideration of the mutual agreements herein contained and intending hereby to be legally bound, the parties hereto agree as follows:

Section 6.02 of the Tripartite Agreement is amended by deleting the proviso in the fourth full paragraph thereof (beginning with the word "provided that the Developer shall lose" and ending with the words "is or may become obligated hereunder") and substituting in its place the following: "provided that, unless the City and the Developer shall agree to a further extension, the Developer shall lose its rights hereunder to proceed with an acquisition if a closing has not occurred by January 1, 1989, unless the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing.

APPROVED AS TO FORM:

/s/ illegible
Corporation Counsel

CITY OF BOSTON

/s/ Raymond L. Flynn
Raymond L. Flynn, Mayor

CITY OF BOSTON

By: Real Property Board

/s/ J. Edward Roche
J. Edward Roche,
Commissioner Real Property
Board Chairman of Real Property Board

WITNESS:

/s/ Carolina DeBenedictis

WITNESS:

/s/ illegible

BOSTON REDEVELOPMENT AUTHORITY

/s/ Stephen Coyle
Stephen Coyle, Director

LAFAYETTE PLACE ASSOCIATES

By: Mondev Mass., Inc., General Partner

/s/ Marco Tonci Ottieri
Marco Tonci Ottieri

(3)

No. 98-863

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LAFAYETTE PLACE ASSOCIATES,

Petitioner,

vs.

CITY OF BOSTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

RORY FITZPATRICK
Counsel of Record
IRENE C. FREIDEL
CHARLES J. DYER
KIRKPATRICK & LOCKHART LLP
Attorneys for Respondent
One International Place
Boston, MA 02110
(617) 261-3100

150924

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should deny the petition for a writ of certiorari where Petitioner Lafayette Place Associates ("Petitioner" or "LPA") did not raise its purported Constitutional law claims before the Supreme Judicial Court of the Commonwealth of Massachusetts and there is no evidence that the Supreme Judicial Court considered or ruled upon the different Constitutional law claim that was presented to it by the Petitioner?

2. Whether this Court should deny the petition for a writ of certiorari where the decision of the Supreme Judicial Court relied entirely upon and was consistent with state common law precedent and does not implicate constitutional concerns?

LIST OF PARTIES

Petitioner Lafayette Place Associates is a Massachusetts limited partnership. Respondent City of Boston is a municipality.

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OPINIONS BELOW

Respondent concurs in the statement of the opinions below recited in the petition.

STATEMENT OF JURISDICTION

As explained more fully below, the Supreme Court lacks jurisdiction to hear this action under 28 U.S.C. § 1257 because the judgment of the Supreme Judicial Court rests entirely upon state law grounds and the federal law issues raised by Petitioner here were not presented to or decided by the court below.

CONSTITUTIONAL PROVISIONS INVOLVED

None. The relevant portions of the judgment of the Supreme Judicial Court implicate only the common law of Massachusetts governing contracts.

STATEMENT OF THE CASE

This case does not merit certiorari review in this Court. The position urged by Petitioner here, i.e., that the Supreme Judicial Court violated constitutional protections by altering settled common law rules, was *never* raised or framed before the Supreme Judicial Court and the Supreme Judicial Court thus never considered or passed upon this issue. The decision of the Supreme Judicial Court, in any event, rests solidly upon bedrock common law principles governing contracts. No federal questions are implicated by the court's judgment. Even if the Supreme Court were to consider imposing constitutional limitations on state common law judgments, which it has consistently refused to do, *Lafayette Place Assoc. v. Boston Redevelopment Authority* is not the appropriate test case.

A. Procedural History

On March 16, 1992, Petitioner filed a complaint in the trial court of Massachusetts against the City of Boston ("City" or

"Respondent") and the Boston Redevelopment Authority ("BRA") seeking, among other things, damages in connection with a contract known as the "Tripartite Agreement." The Tripartite Agreement was executed by the City, Petitioner, and the BRA in 1978 and governed the Lafayette Place commercial development project in the midtown area of Boston.

On October 21, 1994, a jury awarded Petitioner $9,600,000 against the City for breach of contract.

On September 16, 1997, the City filed a notice of appeal.[1] On May 20, 1998, the Supreme Judicial Court of the Commonwealth of Massachusetts ("Supreme Judicial Court"), in a unanimous decision, reversed entry of judgment against the City. In an opinion written by Justice Charles Fried, the Supreme Judicial Court rested its judgment upon a thorough analysis of the terms of the Tripartite Agreement and long-standing principles of Massachusetts common law governing contracts.

Petitioner filed a petition for rehearing with the Supreme Judicial Court on June 10, 1998. In one paragraph of the twenty-one page petition for rehearing Petitioner argued for the first time that judgment in favor of the City violated Petitioner's right to due process. Petitioner did not cite to the Takings Clause of the Fifth Amendment to the U.S. Constitution or claim, as it does here, that the Supreme Judicial Court had "sharply" broken with state common law.

The Supreme Judicial Court did not request a response to the petition by the City and, under Massachusetts Rule of Appellate Procedure 27(a),[2] the City was not permitted to respond in the absence of a request. On July 1, 1998, without written opinion,

1. Due to a procedural matter, the time for appeal did not start running until August 20, 1997.

2. Massachusetts Rule of Appellate Procedure 27(a) provides in pertinent part: "No answer to a petition for rehearing will be received unless requested by the quorum or panel. . . ."

the Supreme Judicial Court denied Petitioner's request for rehearing.

Petitioner filed its petition for writ of certiorari to the Supreme Judicial Court of Massachusetts on November 25, 1998.

B. Factual History

1. *The Tripartite Agreement*

In the late 1970s and early 1980s, Petitioner was the developer of an urban renewal project (known as Lafayette Place) in downtown Boston undertaken pursuant to the state's urban renewal laws. On or about December 22, 1978, Petitioner, the City, and the BRA entered into the Tripartite Agreement, which set forth the basic terms covering the development of the Lafayette Place project.

In the early 1980s, in what is referred to as "Phase I" of the Lafayette Place development, Petitioner developed a garage, a shopping mall, and a hotel. Under "Phase II" of the project, Petitioner generally planned — subject to BRA approval — to build retail space for a large department store and an office tower on an area of land referred to as the "Hayward Parcel," adjacent to the existing mall. The Tripartite Agreement included a clause, Section 6.02, that provided for the possible acquisition by Petitioner of the Hayward Parcel.

Before the City could convey any rights to Petitioner, among other things, the boundaries of the land and air rights that were to be appraised and conveyed had to be defined; the City was to have appraisals performed of certain segments of the Hayward Parcel (parcels "D-3" and "D-4") to determine their value as of 1978; the price for the Hayward Parcel had to be determined pursuant to a formula that contained variables that were not fixed; there was no date set for the transfer; and, there was no agreement on how payment would be made. According to the Tripartite Agreement, the foregoing details were to be determined and set

out in a purchase and sale agreement to be negotiated in the future by the parties. If there were disagreements on the details of the transfer, the parties were to submit their dispute to arbitration.

2. *The BRA's Design Review Process*

The Phase II project, which was in a "very sensitive" city district,[3] was subject to the BRA's intensive design review process. Beginning in approximately 1984, a period of discussions and negotiations ensued between representatives of Petitioner and the BRA regarding what Petitioner could build on the Hayward Parcel. Petitioner's representatives and BRA staff assigned to the Lafayette Place project held numerous meetings from 1985 through mid-1987. By the fall of 1987, Petitioner had not completed any of the four stages of the BRA's design review process for Phase II and, at that point, Petitioner stopped meeting with the BRA.

3. *The January 1, 1989 "Drop Dead" Date*

Following discussions, on October 29, 1987, the City, the BRA, and Petitioner executed an amendment to the Tripartite Agreement known as the Third Supplemental Agreement and Amendment to the Tripartite Agreement (the "Third Amendment"). It was drafted by Petitioner's attorneys and provided in relevant part:

> unless the City and the Developer shall agree to a further extension, the Developer shall lose its rights hereunder to proceed with an acquisition [of the Hayward Parcel] if a closing has not occurred by January 1, 1989, unless the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing.

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3. The Midtown district of Boston contains numerous historic buildings, as well as pedestrian shopping malls, and adverse impacts in that area could threaten the Boston Common environment.

4. *The Campeau Lease*

In March, 1988, Petitioner entered into an arrangement with a large commercial developer ("Campeau") described as a "lease." As part of the deal, Campeau had the option to purchase all right, title and interest of Petitioner in Lafayette Place, which had already been constructed, and any rights Petitioner had under the Tripartite Agreement including whatever rights were provided by Section 6.02, as amended, with respect to the Hayward Parcel.

On March 15, 1988, Petitioner and Campeau executed the "lease." Pursuant to its terms, Campeau took over possession and control of Lafayette Place and assumed the "complete authority, control and responsibility to pursue the development" of the Hayward Parcel. Significantly, in connection with the so-called "lease," Campeau paid Petitioner at least $17,600,000 cash in exchange for all of Petitioner's rights in connection with Lafayette Place and the Tripartite Agreement, *including whatever rights Petitioner had under Section 6.02*. The lease states that Campeau would pay Petitioner an additional $2,000,000 dollars upon transfer of title of the Hayward Parcel from the City to Campeau.

From March 1988 forward, all negotiations and discussions concerning the exercise of the option for the possible sale of the Hayward Parcel as set forth in the Third Amendment were conducted between the City, the BRA and Campeau. Petitioner ceased to be involved with the development project and thereafter did not attempt to have the BRA perform a design review of any design Petitioner had been proposing for the development of Phase II. Prior to transferring its rights in Lafayette Place to Campeau, Petitioner never requested conveyance of the Hayward Parcel; never demanded a deed for the Hayward Parcel from the City; never presented a purchase and sale agreement to the City; never presented appraisals to the City that it contended the City should have done; and made no claim of arbitration under the Tripartite Agreement for delivery of the land.

5. The Expiration of Petitioner's Rights Under The Tripartite Agreement

Beginning in the spring of 1988, Campeau negotiated with the BRA over, among other things, a much larger proposed development of the Hayward Parcel. On December 19, 1988, two weeks before Petitioner's option rights in the Hayward Parcel were to expire, Campeau sent a letter to Boston Mayor Raymond Flynn indicating that Campeau was prepared to make immediate payment for the Hayward Parcel (even though, among other open issues, no price had been calculated or agreed upon).

The "Campeau letter" did not specify when, where, or how Campeau would tender payment. It did not specify a price for the purchase of the Hayward Parcel; it did not suggest a time and place for the parties to meet to resolve their differences; and it did not indicate what Campeau believed the City's obligations were at the time. The statement that Campeau wished to make immediate payment was, as the Supreme Judicial Court noted, contained in a single sentence "embedded in a long letter to the mayor sent only weeks prior to the termination of the option period." 427 Mass. at 521; Appendix to Petition for a Writ ("Appendix") at 40. Campeau sent the letter to Mayor Flynn even though it knew that the BRA, not the mayor's office, had primary responsibility for the Hayward Place transaction.

On December 30, 1988, the director of the BRA wrote to Campeau stating

> [b]y their own terms, prior agreements on Hayward Place will expire on January 1, 1989. This event does not in our judgment alter our willingness to work with you and your representatives to develop the Boston Crossing Project. It simply puts the question of the disposition of Hayward Place in a current context.

On December 30, 1988, a representative of Campeau responded to Mr. Coyle's letter of the same date and stated that it was a "meaningful step forward in making this project a reality."

Accordingly, no closing on the Hayward Parcel took place by January 1, 1989, at which time Petitioner's rights expired under the express terms of the Third Amendment. Nonetheless, during the spring of 1989, Campeau worked with the BRA to obtain design review approval on the development of the Hayward Parcel. In June 1989, the BRA approved the "Boston Crossing" project. Campeau never undertook the development of Hayward Place because, in 1990, it declared bankruptcy.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the Supreme Court lacks jurisdiction. The Court lacks jurisdiction because the case presents no important federal questions; the Court lacks jurisdiction because the decision of the Supreme Judicial Court of Massachusetts rested entirely on state law grounds; and the Court lacks jurisdiction because the purported "federal question" sought to be raised by the Petitioner here was never raised in the Supreme Judicial Court. In addition, the Petition should be denied because the case was decided correctly by the Supreme Judicial Court and because the decision turns on its own facts and will affect few, if any, parties other than the litigants themselves.

The Supreme Judicial Court's judgment rests *entirely* on the application of long-standing Massachusetts contract principles to the terms of the contract at issue in this case. Far from representing a "sharp break" with existing common law, the decision of the Supreme Judicial Court is fully consistent with and rests upon existing common law precedent in Massachusetts. It is well settled that the Constitution of the United States has "no voice" with respect to state civil judgments that rely entirely on state common law grounds. This case does not merit consideration under Rule 10.1, and the Petition should be denied.

An independent reason for denying the Petition is that Petitioner never presented to the Supreme Judicial Court the question that it now seeks to raise here as a purported constitutional issue. Petitioner's failure to raise this issue in the Supreme Judicial Court, although it had the opportunity to do so, should bar review in this Court.

The case was decided correctly by the Supreme Judicial Court. The Supreme Judicial Court carefully reviewed the Tripartite Agreement and the facts on record. It found that the Petitioner had not followed through on a number of the procedures necessary to make the contract complete and integrated, and that therefore Petitioner could not be heard to claim that the City was in breach. The fact that the Petitioner had not followed through on those procedures is not disputed by Petitioner, and the legal conclusion that, as a result, there could be no breach is the only correct one under Massachusetts law. For this reason, too, the Petition should be denied.

I. PETITIONER FAILED TO PROPERLY RAISE, PRESENT, AND PURSUE A SUBSTANTIAL FEDERAL QUESTION BEFORE THE SUPREME JUDICIAL COURT.

Petitioner never raised before the Supreme Judicial Court the question that it now characterizes as a substantial federal question for purposes of this Petition. In the course of briefing this case on appeal in the Supreme Judicial Court, none of the parties, including Petitioner, ever raised, suggested or even hinted at any federal questions, because there were none. At the last moment, in its petition for rehearing in the Supreme Judicial Court, Petitioner made passing allusion to a claim that the "arbitrary and capricious conduct" of the Supreme Judicial Court constituted a violation of Petitioner's "Fourteenth Amendment right to due process." This was not at all the same issue that Petitioner seeks to present to this Court in its petition for a writ; in fact, the question raised in the petition for rehearing in the Supreme Judicial Court is inconsistent

with the question raised by Petitioner here. In any event, Petitioner's effort to raise the issue in the Supreme Judicial Court was untimely. Because Petitioner failed to bring its federal claims and the grounds therefor to the attention of the Supreme Judicial Court with "fair precision and in due time," *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928), the Supreme Court is without jurisdiction to hear Petitioner's claim.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. § 1257 that a substantial federal question has been properly raised, presented, and pursued in the state court proceedings.[4] 28 U.S.C. § 1257(a). As this Court has explained, " 'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 117 S. Ct. 1028, 1031 (1992) (quoting *Webb v. Webb*, 451 U.S. 493, 500). In the absence of proper presentation of federal questions before the state court, the court does not have an opportunity to decide the issue in the first instance and perhaps to reshape or avoid the issue. 117 S. Ct. at 1031.[5]

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4. With "very rare exceptions," we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Roberson, 117 S. Ct. 1028, 1029 (1997) (per curiam) (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)) (citations omitted).

5. "[P]ractical considerations" further limit this Court's capacity to decide issues not raised below. *Id.* (citing *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988)). Proper presentation of federal questions in the state court

> not only avoids unnecessary adjudication in this Court, by allowing state courts to resolve issues on state law grounds,

(Cont'd)

Petitioner comes before this Court to urge that the Court consider Petitioner's claim that the Takings and/or Due Process clauses of the U.S. Constitution were violated by the Supreme Judicial Court because that court "sharply alter[ed] settled common law" and "appl[ied] its new rule retroactively." Petition at i. Petitioner also frames the question presented as follows: "[d]oes the retroactive application of a sharp change in common law operate as a taking in this case?" Petition at 11.

Petitioner never posed these questions or framed these issues in its submissions to the Supreme Judicial Court. As noted, in the briefs filed below on appeal, there was absolutely no mention or suggestion of a federal question of any kind. And in its petition for rehearing before the Supreme Judicial Court, the entirety of Petitioner's identification of and discussion concerning a purported federal question was one paragraph in a 21-page letter brief, as follows, with the heading "The Court's Decision Violates The Due Process Clause of the Fourteenth Amendment Of The United States Constitution:"

> In reaching its result, the Court overlooked settled law concerning the appropriate standard of review to be applied upon review of a denial of judgment notwithstanding a jury verdict. More specifically, the Court conducted its own review of the evidence, drew inferences against, rather than in favor of LPA, discounted or disregarded entirely certain evidence favorable to LPA, and then applied the law to the facts it had improperly determined. In so doing, the Court utterly failed to give deference to the jury's verdict that is required under the long standing law

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(Cont'd)

> but also assists us in our deliberations by promoting the creation of an adequate factual and legal record.

117 S. Ct. at 1031. The parties, in addition, would have "the opportunity to test and refine their positions before reaching this Court." *Id.*

> of the Commonwealth and the United States and therefore effectively deprived LPA of its right to a jury trial. Indeed, the Court, by virtue of its decision, took LPA's property interest in the Hayward Parcel as set forth in Section 6.02 of the Tripartite Agreement, and gave it to the City of Boston. Such arbitrary and capricious conduct constitutes a violation of LPA's Fourteenth Amendment right to due process.

Petition for rehearing at 7; Appendix at 13-14.

Petitioner did not tell the Supreme Judicial Court that, in Petitioner's view, the decision below constituted a "sharp break" with settled common law or that it created a new rule of law. Nor did Petitioner complain of "retroactive application." What Petitioner complained about, and identified for the Supreme Judicial Court as the "constitutional" or federal question, was the "standard of review" applied by the Supreme Judicial Court, and its purported failure to "give the deference to the jury's verdict that is required under the long-standing law of the Commonwealth and the United States." As a result, the Supreme Judicial Court never had the opportunity to consider, let alone address, the "federal question" that Petitioner brings to this Court.

"A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights. . . ." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (quoting *Taylor v. Illinois*, 484 U.S. 400, 407, n.9 (1988)). As this Court stated in *Webb v. Webb*, 451 U.S. 493, 501 (1981),

> [a]t the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal constitution was presented in the state courts *and that those courts were apprised of the nature or substance of the federal claim* at the time and in the manner required by the state law.

(Emphasis added.) The Supreme Judicial Court was never "apprised of the nature or substance" of the claims presented here by Petitioner. *See Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

Not only is the federal question raised by Petitioner in this Court different than the general issue raised in the petition for rehearing, but the two are inconsistent. In essence, in its petition for rehearing, Petitioner asserted that, by weighing the facts itself, drawing inferences against Petitioner, and "appl[ying] the law to the facts it had improperly determined," the Supreme Judicial Court failed to give the deference to the jury's verdict required by the U.S. Constitution. In other words, Petitioner asserted below that the Supreme Judicial Court applied existing law to a mistaken factual premise. This claim is inconsistent with the theory now presented by Petitioner to this Court. Here, Petitioner claims that the Supreme Judicial Court applied *new* law to a factual record, which Petitioner now decides not to challenge.

Even if the federal issues raised here and in the proceedings below were the same, "[i]t has been the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari). *See also Rotary Club of Duarte*, 481 U.S. at 549-550; *Hanson v. Denckla*, 357 U.S. 235, 244, n.4 (1958); *see also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, *unless* the State court exerted its jurisdiction [over them on rehearing]") (emphasis added). As the Court stated in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455 (1924):

> This court has always held it a prerequisite to the consideration here of a federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually entertained and

> considered upon petition to rehear. A mere denial of the petition by the state court without opinion is not enough.

See also Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78 (1988) ("A party may not preserve a constitutional challenge by generally invoking the Constitution in state court [in a petition for rehearing] and awaiting review in this Court to specify the constitutional provision it is relying upon.").[6]

Here, the Supreme Judicial Court denied the petition for rehearing without written opinion and without requesting a response from the City. We do not know whether the Supreme Judicial Court considered Petitioner's federal constitutional law

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6. Petitioner apparently justifies its approach by asserting that there was no federal claim to be raised until the Supreme Judicial Court made a purported "sharp break" with state common law. A federal question may be noted for the first time in a petition for rehearing in a state supreme court if the federal question is triggered by an unanticipated decision of the court. *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935) (holding that assertion of federal claim in petition for rehearing was not timely where state supreme court's decision could have been anticipated by reading of prior decisions). Even then, the question must be squarely presented to the Court. Here, the plain gist of Petitioner's arguments is that any reversal of the judgment in Petitioner's favor amounts to a federal taking or violation of Petitioner's Due Process rights. Thus, Petitioner's constitutional concerns could have been raised before the Supreme Judicial Court issued judgment. Moreover, as explained below, the Supreme Judicial Court's decision does not represent a "sharp break" with common law. As in *Herndon*, the Supreme Judicial Court's decision should have been anticipated based on existing common law precedent in Massachusetts and the City's consistent arguments to the courts, in effect, that the City could not have been in breach of the Tripartite Agreement because Petitioner itself was not prepared to perform. *See* 427 Mass. at 520 n.11; Appendix at 38, n.20. Last, even if Petitioner was justified in not raising a constitutional argument until it filed the petition for rehearing, it failed to squarely present its claim before the state court. *See* discussion *supra*.

claim.[7] In the absence of the state court's consideration and determination of a federal law issue, the Supreme Court — as a prudential matter — should decline to review the state court decision.

II. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME JUDICIAL COURT, WHICH RESTS ENTIRELY UPON STATE COMMON LAW; THE JUDGMENT IS NOT SUBJECT TO CONSTITUTIONAL LIMITATIONS.

It is fundamental that this Court lacks jurisdiction to review matters of state law. The judgment rendered by the Supreme Judicial Court in this action — a garden variety state court judgment based on common law governing contracts — rests *entirely* upon state law grounds. This Court has held repeatedly that a civil judgment of a state court based on common law is not by itself subject to the federal Constitution, even where the judgment unexpectedly overturns state law precedent or judicially impairs rights under contract. Even if the Court were to give credence to Petitioner's oft-rejected argument that "startling" state court judgments should be subject to Constitutional limitations, nothing in Justice Fried's opinion for the unanimous court represents a departure from or break with existing common law in Massachusetts. Thus, there is no foundational premise for

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7. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501. . . .

Adams v. Robertson, 117 S. Ct. at 1029.

Petitioner's constitutional law arguments and there is no basis for Supreme Court jurisdiction over the very local matters raised in this litigation.

In *Herb v. Pitcairn*, the Supreme Court explained that its inability to review state court judgments that rely on state law grounds:

> is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

324 U.S. 117, 125-126 (1945). "[S]ince the state law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 117 S. Ct. 1517, 1522 (1997) (citing *Pitcairn*, 324 U.S. at 125-126)).

A. The Judgment of the Supreme Judicial Court Rests Entirely On State Law Grounds And Does Not "Break" With Common Law Precedent

The judgment of the Supreme Judicial Court is entirely grounded on Massachusetts common law governing contractual obligations and involves no "break" from that law, sharp or otherwise. The only thing novel about the decision is that which is common to any case involving complex commercial and contractual relationships — the application of settled principles of law to the unique facts and circumstances of the particular controversy and contractual arrangement.

While Petitioner glosses over the important contractual issues considered and decided by the Supreme Judicial Court, Justice Fried's opinion analyzes them carefully and cogently. A review

of that analysis demonstrates clearly that the decision was based entirely on existing Massachusetts law governing contracts.

Two principal points were pressed by the City on appeal. It argued first that the option provision of the Tripartite Agreement was too indefinite and uncertain as to its terms, and that therefore no binding contract existed with respect to the option on the Hayward Parcel. The City also argued that, as a matter of law, there was no breach. A critical part of the analysis in the Supreme Judicial Court's decision was its finding that:

> Although the City treats these as quite distinct arguments, we believe that they must be considered together to come to a fair and sensible view of the arrangement between the parties and their dealings with each other pursuant to it. . . . It would be most unfortunate if parties could not make binding, reliable agreements about such complex projects, allowing them to make commitments and seek financing before their conclusion. If the specificity the City claims is necessary were insisted on, no such agreements could be concluded. *But it is the other side of this same coin that the procedures necessary to lend specificity to what at the outset is not entirely specific are an integral part of the agreement the parties concluded, and, if a party does not follow those procedures, it should not be able to claim that the other side is in breach of what is necessarily still an open-ended arrangement.*

Lafayette Place Associates, 427 Mass. at 516; Appendix at 33-34 (emphasis added).

The Supreme Judicial Court examined both interrelated issues within the context of applicable Massachusetts law governing contracts. The court concluded that notwithstanding the contingencies and uncertainties in the Tripartite Agreement,

> [i]f parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding. (cites omitted).

427 Mass. at 518; Appendix at 35. But it was

> only because such mechanisms were specified [in the Tripartite Agreement] that we had been willing to hold that the arrangement between the parties is definite enough to constitute a binding agreement.

427 Mass. at 521; Appendix at 40.

It was in this context that the Supreme Judicial Court attempted to come to a "fair and sensible view of the arrangement between the parties and their dealings with each other pursuant to it." 427 Mass. at 516; Appendix at 33. And it was in this context that the court applied two well-settled principles of Massachusetts contract law. The first principle dictates that when performance under a contract is concurrent, as it clearly was here, one party cannot put the other in default unless he is "ready, able and willing to perform and has manifested this by some offer of performance." *Mayer v. Boston Metropolitan Airport, Inc.*, 355 Mass. 344, 354 (1969) (quoting *Leigh v. Rule*, 331 Mass. 664, 668 (1954)). The other corollary principle is that "any material failure by a plaintiff to put a defendant in breach bars recovery." *Pas-Teur, Inc. v. Energy Sciences, Inc.*, 11 Mass. App. Ct. 967, 968-969 (1981). *See also Kanavos v. Hancock Bank Trust Co.*, 395 Mass. 199, 202-203 (1985) ("the bank's obligation to sell the shares and Kanavos's obligation to pay for them were concurrent obligations. If neither could perform, even if the bank repudiated the contract, neither could recover. 6 S. Williston, *supra* § 882, at 389-391."). In articulating each of these rules, the Supreme Judicial Court cited to and applied established Massachusetts law on contracts.

Upon review of the record evidence, the court found, as a matter of law, that Petitioner had not put the City in breach of the

Tripartite Agreement because neither Petitioner nor the City was "ready, willing, and able to perform." As the Supreme Judicial Court stated:

> LPA's complaint that the city and the BRA breached the contract by failing to determine the exact size and composition of the Hayward Parcel is undermined by LPA's failure to initiate arbitration about the undecided details or even to propose to the city that the procedures specified in the Tripartite Agreement should be used to resolve these differences. Similarly, questions about the treatment of Avenue de Lafayette and the allocation and value of air rights over it and other streets could have been answered in arbitration, but neither LPA nor Campeau ever sought such answers.

427 Mass. at 522; Appendix at 41. Because Petitioner did not resort to the contractual mechanisms that were available to it in order to determine the exact boundaries, market value, and price of the Hayward Parcel, the Supreme Judicial Court determined that Petitioners' offer to purchase the parcel was meaningless. *See id.* at 521-522; Appendix at 40-41.

While Petitioner characterizes the holding of the Supreme Judicial Court as "surprising" and "startling," it was the same result that the City urged on the Supreme Judicial Court, and it was quite unremarkable. To be sure, the City's arguments may not have been made with the concise eloquence of the Supreme Judicial Court's decision as authored by Justice Fried. But the ultimate holding of the Supreme Judicial Court in this case could come straight from the pages of a treatise explicating Massachusetts law of contracts, as follows:

> In this circumstance, where a complex contract leaves certain key terms to be decided by formulae and procedures, and where both parties share responsibility for activating those procedures, the

> plaintiff cannot be ready, willing, and able to tender, nor can the plaintiff put the defendant in default, unless the plaintiff attempts to use the contractually specified mechanisms to overcome the very uncertainties they were designed for. If two parties form an agreement that incorporates procedural devices to overcome unknowns, a plaintiff must at least attempt to make use of those devices before he can claim that the unknowns prevented meeting his obligations at law.

427 Mass. at 523; Appendix at 43.

Contrary to what Petitioner would have this Court believe, numerous Massachusetts cases support the principles relied upon by the Supreme Judicial Court. *See, e.g., Irvin v. Gregory*, 13 Gray, 215, 218 (1859); *Hapgood v. Shaw*, 105 Mass. 276, 279 (1870) (neither party in default where neither offered to perform his part of the agreement); *Cole v. Killam*, 187 Mass. 213, 216 (1905) (plaintiff ready, able and prepared to pay and offered to do so); *Hunt v. Bassett*, 269 Mass. 298, 302 (1929) (recovery denied where plaintiff did not properly exercise option, did not tender purchase price, and did not prove that he offered and demanded performance and was ready, willing and able to carry out his part of the transaction); *Beck v. Doore*, 319 Mass. 707, 710 (1946) (where parties agreed that papers would be passed at bank and plaintiff's attorney went instead to registry of deeds, plaintiff never tested defendant's ability and willingness to perform by tendering performance and demanding conveyance); *Marlowe v. O'Brien*, 321 Mass. 384, 386 (1947) (plaintiff demanded performance where he was ready, able and willing to buy property); *Leigh v. Rule*, 331 Mass. 664, 668 (1954); *Mayer v. Boston Metropolitan Airport, Inc.*, 355 Mass. 344, 354-355 (1969) (no breach where no showing on either side of a "readiness to perform"); *Kanavos v. Hancock Bank & Trust*, 395 Mass. 199, 202-203 (1985) (if neither party could perform neither could recover); *LeBlanc v. Molloy*, 335 Mass. 636, 637-638 (1957) (evidence supported conclusion that plaintiffs were ready, able and willing to perform and had so

informed defendants); *Pas-Teur, Inc. v. Energy Sciences*, Inc., 11 Mass. App. Ct. 967, 968-969 (1981) (plaintiff failed to put defendant in default where no evidence to indicate plaintiff had done what was required of it by the agreement); *Fox of Boylston St. Ltd. Partnership v. Mayor of Boston*, 418 Mass. 816, 819-20 (1994) (notice letter specified closing date and location); *Bucciero v. Drinkwater*, 13 Mass. App. Ct. 551, 552-553 (1982) (buyer was ready, willing and able to perform when he arrived at closing with payment).

Even if the Supreme Judicial Court got it wrong — and it did not — its mistake would have been in how it applied existing Massachusetts law to the record. It is not the business of this Court, nor within its jurisdiction, to sift through factual records and correct such purported mistakes. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

With respect to the fact that Petitioner's contract was with the government, the court noted only that, while

> governments are [not] absolved from performing contractual obligations, . . . where a government contract specifies procedures and methods a private party must be particularly assiduous to comply with them. "Men must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.).

427 Mass. at 523-24; Appendix at 43. This *dicta* was not material to the Supreme Judicial Court's holding and, in any event, says nothing more than that a party to a contract, whether it is a governmental entity or not, must comply with the precise terms of the agreement. Surely, Petitioner cannot argue seriously that this principle is inconsistent with Massachusetts precedent.

Except to Petitioner, which clearly did not expect to lose its multi-million dollar jury verdict, the Supreme Judicial Court's opinion is not at all surprising. The decision is simply another case in the *body* of common law in Massachusetts; it is not a departure from existing common law or a limitation or expansion of the substance of contracting parties' rights under the state's common law. A common law decision that rests entirely upon — and does not break with or overturn — common law precedent or otherwise implicate constitutional concerns does not trigger Supreme Court jurisdiction. Any result to the contrary would represent a severe crack in this country's federal system of government.

B. The Judgment Of The Supreme Judicial Court Does Not Raise Federal Constitutional Issues

Petitioner asks this Court to hold that a civil judgment of a state's highest court, which overturns or "sharply breaks" with prior common law precedent, may violate a party's federal constitutional rights under the Due Process Clause and the Takings Clause of the U.S. Constitution. There is no support for Petitioner's argument. As stated above, the Supreme Judicial Court's judgment in this action did not overrule or sharply break with prior common law precedent in Massachusetts governing parties' obligations under contract. Thus, the premise for Petitioner's constitutional law theories does not exist. Moreover, even if it did the Supreme Court has made clear that a civil judgment of a state court based on common law does *not* by itself implicate federal questions.

Relief from changes — sharp or otherwise — in state common law is exclusively a matter of state law, even where the effect of the purported change may impair the validity of a contract. "There is no constitutional right to have all general propositions of law once adopted remain unchanged." *Patterson v. Colorado*, 205 U.S. 454, 461 (1907). This Court has further held that the federal Constitution has "no voice" regarding a state court overruling a state law. *Great Northern Railway v. Sunburst Oil & Refining*

Co., 287 U.S. 358 (1932). If a federal question is not presented in the action, the Supreme Court may not interject itself into a state court decision overturning state civil law. *See also Patterson, supra* at 461 ("Even if it be true, as the plaintiff in error says, that the supreme court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed.").

In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455-456 (1924), the Court held that

> [t]he mere reversal by a state court of its previous decision, as in this case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the federal Constitution. Plaintiff's claim, therefore, does not raise a substantial federal question. This has been decided in so many cases that it becomes our duty to dismiss the writ of error for want of jurisdiction.

The Court stated specifically, that a state court's reversal of an earlier decision "to the prejudice of one party *does not take away his property without due process of law*." *Id.* at 450 (emphasis added).

Following *Tidal Oil,* the Court in *Fleming v. Fleming*, 264 U.S. 29, 31 (1924), held that "judicial impairment of a contract obligation" does not present a "federal question of which this court could take jurisdiction on a writ of error from a state court." The *Fleming* Court further rejected the argument, which Petitioner makes here, that the state court's decision could have been "legislative" in nature. *Id.* at 31-32.

Echoing these principles as to overrulings of state common law decisions, even when those decisions are applied "retroactively," Justice Cardozo stated in *Great Northern Railway v. Sunburst*:

> [w]e think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. . . . The alternative is the same whether the subject of the new decision is common law . . . or statute. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.

287 U.S. at 364-65 (internal citations omitted).

Similarly, in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), Justice Brandeis stated that judicial changes in the common law do not implicate rights under the U.S. Constitution:

> the process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of earlier decisions.

Id. at 681 n.8.

The Court's statements cited above are consistent with the principle that a state's highest court is the final arbiter of state law within its jurisdiction. *See Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Herb v. Pitcairn*, 324 U.S. 117, 125-126

(1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.").[8]

From a practical standpoint, a Pandora's box would be opened if the Court were to impose federal constitutional review on state court decisions that may constitute a "sharp" break with precedent. The number of petitions for a writ of certiorari could escalate sharply. Moreover, the evaluation of state court decisions to determine if they represent "sharp" enough breaks to trigger constitutional protections would cause an unwarranted invasion into the well-established boundaries between federal and state law that have existed for more than two hundred years.

As Petitioner acknowledges,

> [t]he essence of the common law is its evolution over changing circumstances and times. This Court has been reluctant to place constitutional limitations on this important attribute of the common law tradition.

Petition at 9-10. To the extent that the Supreme Judicial Court's judgment represents *any* change in state common law (which it

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8. Petitioner's tenuous reliance on Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967) is unavailing. First, as discussed above, the Supreme Court has refused on repeated occasions to find that unexpected state law decisions may trigger constitutional limitations. "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (Jackson, J., concurring). Second, even Justice Stewart recognized in *Hughes* that if a state court decision "arguably conforms to reasonable expectations," the Court must accept it as conclusive of prior state law. 389 U.S. at 296. As the City has argued above, the Supreme Judicial Court's opinion did not "break" with precedent or upset "reasonable expectations."

does not), that change is nothing more than a gradual evolution of a living body of law.[9]

C. Petitioner's Takings and Due Process Arguments Have No Basis

Even if the Court were to consider applying constitutional limitations to state common law judgments, the takings and due process arguments urged upon the Court by Petitioner lack merit. The Supreme Judicial Court did not "take" property belonging to Petitioner and give it to the City; but for a legally erroneous jury verdict, Petitioner never had property rights in the Hayward Parcel. Under these circumstances, neither the Takings Clause nor Due Process Clause of the U.S. Constitution can be implicated.

1. *The Supreme Judicial Court did not "take" Petitioner's property*

Petitioner asserts that a state court's "sharp break" with civil common law can result in a taking. Specifically, Petitioner asserts that the Supreme Judicial Court's decision to reverse the jury verdict against the City — because it was a "surprise" to Petitioner — effectively took Petitioner's property rights in the Tripartite Agreement. In addition to the reasons stated above, Petitioner's argument must fail because the Supreme Judicial Court did not "take" any property rights belonging to Petitioner.

Specifically, Petitioner argues that

> [a]bsent the retroactive application of these new common law doctrines, LPA would have retained

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9. Applying a takings analysis to a judicial decision based on the common law is inconsistent with the fundamental principle that the common law is a fluid and ever-changing body of law. Indeed, despite numerous opportunities to do so, the Supreme Court has never held that a state judicial change in state common law can result in a violation of the Takings Clause of the U.S. Constitution.

> its $9.6 million judgment because the Campeau letter met the "some offer of performance" rule in *Leigh v. Rule*.

Petition at 16. Petitioner's remarkable argument, however, is based on its overly limited reading of the Supreme Judicial Court's opinion described above. Under Massachusetts law, Petitioner's purported offer of performance in the Campeau letter was insufficient because, at the time it was made, neither Petitioner nor the City was "ready, willing, or able" to perform. Petitioner had not made efforts to resolve open issues that had to be settled — under the specific mechanisms set forth in the Tripartite Agreement — in order for the sale of the Hayward Parcel to take place.

No "surprise" decision of the Supreme Judicial Court in this case rendered Petitioner's offer of performance invalid. As a matter of law, that offer was invalid when it was made. Thus, Petitioner never had property rights in the Hayward Parcel, and there was never any basis for its multi-million dollar award against the City. The Supreme Judicial Court's decision, rather than take property that rightfully belonged to Petitioner, did nothing more than correct a legally erroneous jury verdict.

The essence of Petitioner's argument is that if the court had not reversed the jury verdict it still would have a multi-million dollar award against the City. In other words, Petitioner suggests that, prior to final review of the jury's verdict, it had a *vested* property right in that verdict. According to Petitioner, that the court reversed the jury verdict means the court "took" what belonged to Petitioner for the benefit of the City.[10] This strident argument, if accepted, would mean that any state court's reversal

10. The Supreme Judicial Court, of course, has the power to reverse a jury verdict where it is against the weight of the evidence. *See Forlano v. Hughes*, 393 Mass. 502, 504 (1984); *New England Acceptance Corp. v. American Mfrs. Mut. Ins. Co.*, 373 Mass. 594, 596 (1977); *Rubel v. Hayden, Harding & Buchanan, Inc.*, 15 Mass. App. Ct. 252, 254 (1983).

of a jury verdict based on state common law would trigger federal constitutional protection. This is not a result expected or intended by the U.S. Constitution or the precedent of this Court. No taking, within the meaning of the federal Takings Clause, could have occurred here.[11]

2. *There are no due process issues presented by this case*

As noted above, federal substantive due process principles generally do not apply to state civil judgments. This Court has stated in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) that

> the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.[12]

Similarly, in *American Ry. Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927), the Court noted that

> [i]t is firmly established that a merely erroneous decision by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law.

See also Tidal Oil Co. v. Flanagan, *supra*, 263 U.S. at 450.

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11. In the interest of brevity, the City does not respond to the remainder of Petitioner's takings argument, which the City believes is without merit. If the Court wishes further briefing on this issue, the City will be pleased to provide it.

12. In *Brinkerhoff-Faris*, the Supreme Court reversed a decision of the Missouri Supreme Court on the ground that the judgment denied appellant due-process in the "primary" (i.e., procedural) sense. 281 U.S. at 681.

In its desperation to construct a constitutional issue, in the end Petitioner can do nothing more than rely on argument by adjective. Petitioner describes the Supreme Judicial Court's judgment as "arbitrary," "capricious," "self-interested," "unfounded," unjustified, and "unprincipled." As discussed above, however, the Supreme Judicial Court's decision was none of these things. The stark reality is that Petitioner did not expect to lose its multi-million jury verdict; that it did so does not provide a basis for impugning the integrity of Massachusetts' highest court.

CONCLUSION

For all of the foregoing reasons, Respondent the City of Boston respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

RORY FITZPATRICK
Counsel of Record
IRENE C. FREIDEL
CHARLES J. DYER
KIRKPATRICK & LOCKHART LLP
Attorneys for Respondent
One International Place
Boston, MA 02110
(617) 261-3100

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In the Supreme Court of the United States

OCTOBER TERM, 1998

LAFAYETTE PLACE ASSOCIATES,
PETITIONER,

v.

CITY OF BOSTON,
RESPONDENT.

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court Of Massachusetts

REPLY TO BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

Stephen H. Oleskey
Counsel of Record
Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6544

Alan M. Dershowitz
Of Counsel
1575 Massachusetts Avenue
Cambridge, MA 02138-2801
(617) 495-4617

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STATEMENT OF THE CASE

A. Procedural History

The City mischaracterizes LPA's petition for rehearing, asserting that LPA "did not cite to the Takings Clause of the Fifth Amendment . . . or claim . . ., that the [SJC] has 'sharply' broken with state common law." Opp. 2. LPA did not cite to the Fifth Amendment because it has no direct Fifth Amendment claim against a *State* entity and could only make the Takings contention through the incorporation of that clause by the Fourteenth Amendment's Due Process Clause. *Chicago, Burlington and Quincy RR. Co. v. Chicago*, 166 U.S. 226, 232-34 (1897). LPA did, however, argue that "the [SJC], by virtue of its decision, *took LPA's property interest* in the Hayward Parcel . . ., and *gave it to the City*." App. 13-14[1] (emphasis added).

Furthermore, LPA made all the arguments in its rehearing petition it relied on in its petition for writ of certiorari. App. 6-7 (the requirements for tender broke with prior precedent); 8-10 (the SJC ignored established standards for excuse of performance); 17-20 (the heightened standard for individuals dealing with government violated settled principles).[2]

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[1] The abbreviation "App." refers to the appendix filed with LPA's original petition. "SA" refers to the supplemental appendix, attached.

[2] The City castigates LPA for spending only one paragraph of its "*twenty-one page*" petition for rehearing on the federal issues. Opp. 2, 10. Yet LPA's petition was strictly limited to *ten pages* by Mass. R. App. P. 27(b). LPA used all ten pages permitted to argue the many errors it believed the SJC had made. Much of the petition concerned the sharp changes in State law which are integral to LPA's federal claims. App. 6-10, 17-20. Given space limitations, LPA could not repeat all these arguments in the federal section.

B. Factual History

1. *The Tripartite Agreement*

The Tripartite Agreement did leave some details open; however, most of these were to be resolved initially by the City and were arbitrable only if LPA disagreed. For example, the City was required to obtain the appraisals for parcels D-3 and D-4 but admittedly never did. Since no disagreement over the appraisals ever occurred, there was no basis to invoke arbitration.

2. *The BRA's Design Review Process*

The City notably avoids any mention of the numerous regulatory roadblocks to which the BRA subjected LPA or of the City's own candid public and private expressions of intent not to abide by the Tripartite Agreement. Pet. 5-7; App. 74; SA § A; *cf. San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 655 n. 22 (1981) (Brennan, J. dissenting). Despite these efforts, LPA completed the first stage of the design review process. *Compare* Opp. 4 *to* SA § B.

3. *The Campeau Lease*

The City seeks to shift the Court's focus by emphasizing LPA's lease and its lack of involvement in pursuing the acquisition after October 1987.[3] This requires the City to ignore trial testimony which showed that LPA agreed to the lease only because of stonewalling by the City

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[3] The City strikingly omits any reference to LPA's proposed sale to Campeau during the claimed period of inaction in late 1987/early 1988 when LPA was dealing regularly with the BRA. The BRA sought to use its approval authority over the project transfer to leverage substantially more money for the City from the sale. SA § E (BRA Director told LPA that he would not approve the sale "until I get a higher value for the [Parcel].").

and that the lease was not profitable for LPA. SA § C. LPA could not pursue the acquisition itself after the March 1988 lease because its rights had been delegated to Campeau. Campeau, however, pursued the acquisition diligently throughout 1988, right up to its December 1988 offer to purchase the property "immediately." App. 87. LPA retained a strong interest in the acquisition; it was due $5,000,000 if Campeau acquired the property.

While the City faults LPA for its alleged inaction before the lease, the City necessarily glosses over the numerous meetings and discussions LPA had with City and BRA officials in an effort to conclude the acquisition. SA § D. The City also omits that its failure even to define the final boundaries of the property or obtain the needed appraisals, despite numerous requests by LPA, effectively precluded LPA from the very actions the City now argues were required.

4. *The Expiration of LPA's Rights Under the Agreement*

The City repeatedly faults LPA and Campeau for an alleged lack of detail in the December 1988 Campeau letter.[4] The City, however, declines to acknowledge that its own actions precluded Campeau from sending a more detailed letter. Moreover, the City did not respond in good faith to the letter, waiting to reply until the eve of the drop dead date.[5]

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[4] The Campeau letter of December 30, 1988, now cited by the City, was excluded at trial. In any event, the letter was at most an effort by Campeau to appease the BRA, which held absolute power of approval over Campeau's huge proposed redevelopment.

[5] As to the clearly erroneous conclusion by the SJC, now eagerly embraced by the City, that the Campeau letter was sent to the "wrong party," the City, not the BRA, owned the Hayward Parcel. Moreover, since the jury found that the BRA did not act as the City's agent, sending the letter to the BRA would not have been appropriate. App. 7 n.4.

REASONS FOR GRANTING CERTIORARI

LPA's petition for writ of certiorari presents a viable and significant federal constitutional claim. The City misstates LPA's position, reframing it as the oft-rejected claim that a change in State common law can present a federal constitutional issue. LPA argues rather that the confluence of a sharp retroactive break in State common law with a resulting direct benefit to the State at the expense of a private party can constitute a constitutionally cognizable claim. Nowhere in the City's Opposition does it even acknowledge that LPA's argument requires direct benefit to the State.

Since the principal aim of the Fourteenth Amendment is to protect individuals from the arbitrary exercise of State power, this tenet of LPA's argument is of central importance. As LPA argued, the exercise of State power for the benefit of the State requires enhanced federal scrutiny. Pet. 21, 25-27.

Moreover, the City's contention that this case is fact specific and lacks any general importance is wrong. The broad constitutional question LPA asks this Court to consider — whether a sharp change in common law made by a State court for the economic benefit of that State (or subdivision thereof) is constitutional — is a question never before answered by this Court, and is apt to recur.

A. LPA Timely Raised Its Federal Constitutional Claims And Presented Them Adequately To The SJC.

The City advances two flawed arguments to convince this Court that it lacks jurisdiction. The City's primary contention is that LPA raised its federal claims too late, and that they are unreviewable in any event because the SJC did not explicitly address them.[6] Such an assertion contradicts

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[6] In none of the cases the City cites, however, was the petition for rehearing genuinely the first opportunity to raise the federal claim.

this Court's precedents: "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity to raise it." *Herndon v. Georgia*, 295 U.S. 441, 444 (1935); *see, e.g., Cole v. Arkansas*, 333 U.S. 196, 200 (1948); *Great Northern R. Co. v. Sunburst Oil Ref. Co.*, 287 U.S. 358, 366-67 (1930). These cases hold that jurisdiction is proper even if the petition for rehearing is summarily denied without reference to the federal claims.

LPA argued at length in its petition that the SJC's decision was a surprising departure from precedent on several grounds. The City effectively concedes, Opp. 18, that it did not make the arguments adopted by the SJC — undoubtedly because it, like LPA, thought they were foreclosed by existing precedent. Thus, this case represents the classic instance in which first raising an argument in a petition for rehearing is not only appropriate but necessary.

The City also criticizes LPA for the way in which it presented its constitutional claims, and even asserts that LPA's petition for rehearing is inconsistent with its petition for a writ of certiorari.[7] LPA devoted a separate section of its petition for rehearing to the federal issues.[8] In the heading

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[7] This assertion of inconsistency is particularly baffling since, in its petition for rehearing, LPA asserted both the arguments set out in its petition for writ of certiorari, and repeatedly urged that the SJC's decision departed from clear precedent. There is no basis for the City's claim that LPA alleged only that the SJC conducted inappropriate fact-finding and misapplied those facts to existing law. App. 6-10, 17-20.

[8] The City correctly notes that this section of LPA's rehearing petition (like the other sections) was brief, but this Court has never required any more than enough to give the State court an "opportunity to correct [the] constitutional violation." *Piard v. Connor*, 404 U.S. 270, 275 (1971). LPA's brevity was required given the ten page limit. The case involved a complex commercial transaction spanning a decade, and the SJC's forty-one page opinion contained numerous issues which LPA needed

of this section, LPA cited the Due Process Clause of the Fourteenth Amendment, the provision under which it seeks a writ of certiorari. Furthermore, the petition noted both the ordinary due process claim LPA was making by referring to the SJC's "arbitrary and capricious" actions, and the Takings claim by noting that the SJC's decision "took LPA's property interest in the Hayward Parcel . . ., and gave it to the City." *Contrast Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

Because LPA clearly identified the constitutional provisions in question, the City's complaint can only be premised on the limited claim that LPA did not reargue the sharp break in State law in the federal claim section of its petition for rehearing. Yet LPA in fact noted specifically that the SJC "overlooked settled law" and made the same arguments at length on the sharp break in State law in asking the SJC to reconsider its decision based on errors in State law. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) ("No particular form of words or phrases is essential. . . . [I]f the record as a whole shows either expressly or by clear intendment [that the claim was brought to the attention of the State court], the claim is to be regarded as adequately presented."). LPA's presentation of these issues is consistent with this degree of specificity. *See, e.g., Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978); *cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980).

B. <u>The Supreme Court Has Jurisdiction Because LPA Has Raised Valid Federal Constitutional Claims</u>.

LPA has limited its claim to those cases where a State court judgment represents a sharp and unexpected break with existing precedent *and* the State itself (or subdivision

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to address.

thereof) directly benefit as a result. LPA does not dispute that State common law judgments are ordinarily not reviewable, and LPA has not asserted that "startling" State court judgments are reviewable. If LPA's constitutional claims are valid, jurisdiction follows as a matter of course.

1. *The SJC's Decision Constituted a Sharp Break with Prior Doctrine.*

The City utterly failed to show that any of the three changes LPA identified the SJC as making in State law were grounded in prior precedent. First, the City mischaracterizes LPA's position that the Campeau letter would have been a sufficient offer of performance under Massachusetts law. The City offers a page long string cite to demonstrate that a party must be ready, willing, and able to perform to recover in contract. Opp. 19-20. But LPA never argued otherwise. Rather, LPA argued that, under existing Massachusetts law articulated in *Leigh v. Rule*, 331 Mass. 664, 668 (1954), the jury was justified in concluding that LPA and Campeau fulfilled their obligations and were ready, willing, and able to perform. App. 69-70. The City conspiciously failed to offer a single prior decision in which anything more than the *Leigh* rule of "some offer of performance" was required.[9] *Id.*[10]

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[9] Not only did the City fail to make the argument with the "concise eloquence" of Justice Fried, Opp. 18, it never made the argument at all, much less cited any of the cases upon which it now relies. Pet. 13.

[10] The City argues fawningly that the SJC's opinion "could come straight from the pages of a treatise explicating Massachusetts law of contracts," Opp. 18, but notably cites not a single case or treatise with which the opinion is consistent.

Second, the City simply and conveniently ignores LPA's argument that the SJC raised the bar for excusing non-performance where performance would be futile.[11] Pet. 14.

Third, as to LPA's argument that the SJC violated settled principles of State law by holding LPA to higher standards because it contracted with the government, the City's response is wrong because it plainly misconstrues the SJC's opinion. The opinion makes clear that a private entity such as LPA "must be particularly assiduous" when dealing with the government. *Lafayette Place Assoc. v. Boston Redevelopment Auth.*, 427 Mass. 509, 523-24 (1998) ("Men must turn square corners when they deal with the Government"). The obvious conclusion is that LPA had a higher standard to meet in seeking to recover against the City than it would face in dealing with a private entity. The City's claim that the SJC means only that any "party to a contract, whether it is a government or not, must comply with the precise terms of the agreement" is a transparent linguistic slight of hand. Finally, the City utterly gives away its point by asserting that LPA "cannot argue seriously that this principle is inconsistent with Massachusetts precedent," Opp. 20, while failing either to cite a single case supporting the SJC's position or to address any of the conflicting cases cited by LPA. *Compare* Opp. 20 *with* Pet. 15-16.

2. *The SJC's Decision Constitutes A Taking*

The City's Opposition fails to address meaningfully LPA's principal constitutional argument. The City simply ignores a central tenet of LPA's argument — that the benefits

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[11] While the City tediously reiterates that LPA never triggered the contract's arbitration procedures, it never addresses LPA's argument that, under existing Massachusetts law, LPA would have been entitled to have the jury determine whether it was excused from submitting its claims to arbitration because to do so would have been futile. Pet. 14; *see Hastings Assoc., Inc. v. Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 171 (1997).

of the sharp change in law must inure directly to the government. Not once does the City acknowledge this central aspect of LPA's argument, much less address whether the requirement of a direct benefit to the government meaningfully distinguishes this case from the long list of cases the City cites.[12] Notably none of those decisions address a case, as here, where there is both a sharp change in the law and a resulting direct benefit to the State.[13]

3. *The SJC's Decision Violates Due Process*

The property interest asserted by LPA is the long established, protected property right in contract. Pet. 16. The City's assertion that LPA's petition relies on a vested property interest in the jury verdict is untrue, Opp. 26-27, and the City's conclusion that accepting LPA's argument would subject every jury verdict to constitutional scrutiny is therefore disingenuous.

The City's claim that LPA failed to raise due process concerns is as flawed as it arguments against LPA's Takings claim and for the same reason: the City conveniently leaves out half the argument. Absent the resulting $20,000,000

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[12] The City's effort (Opp. note 8) to discredit LPA's reliance on Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 294 (1967), is ineffective. The City's first argument fails again to recognize the distinction recognized by Justice Stewart and relied upon here by LPA - that the constitutional question is stronger when the benefit inures to the government. The City's second argument does not challenge the point at all, but merely reiterates its claim that there was no sharp break here.

[13] The City's failure to confront one of the key limiting principles in LPA's argument opens the door for it to trot out the hackneyed tautologies that granting the writ would open a "Pandora's Box" and that "petitions for writ of certiorari would escalate sharply." Opp. 24. The cases in which both a sharp break and a substantial economic benefit to the State occur would be few and would hardly result in a landslide of new petitions for writ of certiorari. *See* Pet. 11 n.9.

economic benefit to the City, LPA might well have no claim, but that is not LPA's contention. LPA respectfully suggests that an evaluation of its whole argument will lead the Court to find a viable and important constitutional claim.[14]

CONCLUSION

For the foregoing reasons and for those cited in LPA's petition for writ of certiorari, LPA respectfully requests that the Court grant a writ of certiorari.

Respectfully submitted,

Stephen H. Oleskey /ADJ
Stephen H. Oleskey
Counsel of Record
Hale and Dorr LLP
60 State Street
Boston, MA 02109

Alan Dershowitz
Of Counsel
1575 Massachusetts Ave.
Cambridge, MA 02138

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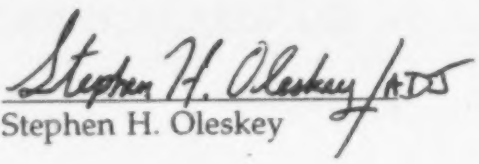
[14] Although the adjectives "self-interested," "unfounded," and "unprincipled" to which the City refers, Opp. 28, do appear in LPA's petition, LPA never asserted that the justices of the SJC had any personal self-interest as the City now implies. Likewise, the term "unprincipled" appears but once and is not used in reference to the SJC's opinion.

CERTIFICATE OF SERVICE

Stephen H. Oleskey hereby certifies under the pains and penalties of perjury that he caused a true copy of the Lafayette Place Associates' Reply to Respondent's Brief in Opposition to be served on February 4, 1999 by mail upon Rory Fitzpatrick, Esq., Kirkpatrick & Lockhart LLP, One International Place, Boston, MA 02110-2637, special counsel for the City of Boston.



Stephen H. Oleskey

SUPPLEMENTAL APPENDIX

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Section A

Trial Testimony of Mr. Coyle, BRA Director

Q Is that the proposal by Commissioner DiMenno to put a new street down the middle of the Hayward parcel?

A Yes. I think I said earlier that this was on the table for some time.

. . .

Q That was Mr. Shou?

A Yes. That you can't put a road with 40-foot dimensions or 50-foot dimensions through the middle, going diagonally, across a development site and still build. And the reference was, what was the standard floor plate for downtown development of that generation of buildings. And they tended to be between twenty and twenty-five thousand gross square feet. But it's also clear to me that they do not seem to understand that the building has pertinent uses as well as just its walls coming down on terra firma.

. . .

Q Do you recall anything further about the discussion as related to the construction of phase two on the Hayward parcel?

A Yes. We talked about the slowness of the system and why he was stalling. And he said to me that the option price was too cheap. That in 1978 – we came in there. I was a bad area, and the Combat Zone was rampant. He'd like to change the deal now to reflect the values in 1987.

Letter from Mr. Coyle to LPA

Boston
Redevelopment
Authority

Raymond L. Flynn
Mayor

Stephen Coyle
Director

One City Hall Square
Boston MA 02201
617-322-4300

April 22, 1987

Mr. Marco T. Ottieri
Lafayette Place Associates
1 Avenue de Lafayette
Boston, MA 02111

Dear Mr. Ottieri:

As part of the Boston Redevelopment Authority's review of the Lafayette Place II development, the Authority requires the submission and approval of a meeting with BRA staff. This impact report shall incorporate the Transportation Access Plan which is required by the City of Boston.

The studies which are required for your proposal are listed in the attached Scope of the Environmental Impact Assessment, which includes the format of the EIA and a description of the environmental issues to be addressed.

Prior to presentation of your proposal to the BRA Board, the environmental studies will be distributed to public agencies

and interested groups and individuals for a 30-day public review period. Prior to the Authority's approval of your project, the environmental studies and any necessary mitigation measures must meet with Authority approval.

Please work with my staff in coordinating the content and timing of the environmental report with the ongoing design review process.

As you formulate your plans for Lafayette Place II, the project should be analyzed based on the heights and massing controls outlined in the proposed Downtown Interim Planning Overlay District amendment to the Zoning Code. The restrictions specified for the Hayward Place limit project height to 125-155 feet and FAR 8-10. Once established, IPOD controls will apply to downtown projects, including Chapter 121A projects, for two years.

I look forward to continuing our cooperative review with you during the coming months.

Sincerely,

s/Stephen Coyle

Stephen Coyle
Director

Trial Testimony of Mr. Ransen, LPA's Principal

Q. (By Mr. Oleskey) Mr. Ransen, when you learned from Mr. Ottieri that Mr. Coyle had sent a letter to him on April 22nd indicating that because of the IPOD the building that you were planning to build should be at 125 feet, were you surprised?

A. Yes.

Q. Why?

A. Because I had met with him before that, and we had agreed on an envelope and a size for the project.

Section B

Trial Testimony of Ms. Allen, BRA's Asst. Dir. of Urban Design

Q So, we can agree that this project was at least in Stage II, can we not?

A Yes.

Section C

Trial Testimony of Mr. Ransen, LPA's Principal

Q. The question is, Mr. Ransen: Why did you decide to sell these interests to Mr. Campeau and his companies at this time?

A. Well, when the project was built, it only had one department store, and it wasn't successful. And we had always planned to get the second department store on the Hayward Place site. After these years of having problems getting it approved, we thought we couldn't get this site for the second department store.

Campeau was a much bigger developer with much bigger resources, and he owned Bloomingdale's. It was a lot easier for him to get the department store there than we could. And since we weren't doing well with Mr. Coyle, we thought because it's Jordan Marsh, they would have a lot more trump to do well.

It was very important for us as a developer to see that project completed. We didn't want it to become a failure; we wanted it to be a good project for downtown Boston, and so we needed the department store there. The only way to get it was to have Campeau do it.

. . .

Q. Was the Campeau sale a profitable one for you?

A. No.

. . .

Q. How much [did LPA receive under the lease with Campeau]?

A. We received less than we got on the sale. We received $12 million plus a note.

Section D

Trial Testimony of Ms. Allen, BRA's Asst. Dir. of Urban Design

Q What do you recall is being at meetings with the developer in 1986 and in 1987 until you left, where there were discussions about detailed issues concerning the Lafayette Place Associates proposal, isn't that right?

A I do recall some meetings with the developer. I do not recall what years those were when I attended those.

Section E

Trial Testimony of Mr. Ransen, LPA's Principal

Q. What did Mr. Coyle say to you at that meeting?

A. Well, I discussed with him the problem of getting the transfer made. I explained to him, as I explained to the jury, that we should all agree in essence to get the project completed so it's successful. It was really the spark plug for the entire area around the combat zone, and I tried to impress him that he should have the approval made quickly, expedited, to get Campeau in there and start doing the building.

Q. What did Mr. Coyle say?

. . .

A. Mr. Coyle said, "No, not until I get a higher value for the land. And I don't want you to take all that profit and run back to Canada with it."